

1. These applications sought further reasons from an arbitrator for an award and a remission or setting aside of that award pursuant to sections 22 and 23(2) of the Arbitration Act 1950.
2. The judgment considers what is "a question of law" for the purpose of founding an appeal from an arbitrator's award and what is the applicable test for determining an application for further reasons and what material may be considered by the court in reaching that determination. The judgment then applies that test to 5 specific and discrete applications for further reasons.
3. The judgment also considers the what the applicable test is for a remission application and applies that test to 7 specific and discrete complaints of procedural irregularity.
4. The applications were dismissed with costs to be taxed and paid by the applicant.

JUDGMENT No. 1 His Honour Judge Thornton Q.C. TCC : 2nd December 1997

PART A. GENERAL MATTERS

1. Introduction

1.1 Background To The Applications

1. This judgment follows the first of two court hearings concerned with applications for judicial intervention in respect of the final award of an arbitrator, Mr. R. Forde, FRICS, FCI Arb, Registered Arbitrator, published on 13th June 1997. The arbitrator had been appointed, by an appointment agreed to by the parties in July 1995, to resolve disputes between Norwest Holst Construction Limited ("NHC"), the respondent in the arbitration, and Co-Operative Wholesale Society Limited ("CWS"), the claimant in the arbitration. CWS was appointed a subcontractor to NHC for the supply of labour, plant, materials and consumables for the installation of the mechanical and electrical services in connection with a main contract for the construction of facilities for John Moores University in Liverpool. These facilities are what traditionally would be called a library but, given that we live in an age of information technology, they were described in the contract documents as the provision of a new "Learning Resources Centre".
2. The claims put forward by CWS were both large and extensive. They covered most aspects of the work, both as to its proper valuation and as to the time that the work should have taken to be completed. The valuation of all the so-called measured work was in dispute, as was the appropriate sum to be paid for the contract over-run period. In all, a sum of nearly £900,000 was claimed. In addition, an extension of time of 24 weeks was claimed. NHC denied CWS's entitlement to any part of these claims and, in turn, counterclaimed approximately £136,500 by way of liquidated damages paid by it to the employer and certain site costs. NHC alleged that it had only had to pay these liquidated damages to the employer because of CWS's breach of contract in completing the subcontract late. In his final award, the arbitrator awarded CWS £277,930.22. and VAT and an extension of time of 21 weeks, of which 19 weeks were with costs. This sum took into account a sum of £15,858.72 awarded to NHC on the counterclaim. All questions of financing charges and interest and the costs of the reference and of the award were left over and await the results of these judicial challenges to the award.
3. NHC is the principal challenger of the award. This challenge now takes the form of appeals set out in 9 grounds of appeal, an anterior application for further reasons in relation to 16 requests covering 5 of these grounds of appeal and applications to remit or set aside on 8 different grounds. These 8 grounds cover much the same ground as the 9 grounds of appeal. CWS, in a more modest riposte, seeks to appeal on 3 different grounds which are closely related to 3 of the grounds of appeal raised by NHC.
4. The applications to remit and set aside are made under both sections 22 and 23(2) of the Arbitration Act 1950. The grounds for seeking to invoke both of these sections are procedural irregularity and a misapprehension by NHC as to both the procedure that would be adopted by, and as to the matters that would be considered by, the arbitrator. Thus, the jurisdiction being invoked is that sometimes characterised as the jurisdiction given to the court to intervene where there has been arbitral "misconduct". However, the challenge is wider than that, covering allegations that the court should intervene because of mistakes or misapprehensions by NHC as to the procedure being followed and the ambit of the hearing. For this reason, and because the epithet "misconduct" has become an unacceptable misnomer for acts by, or the award of, an arbitrator which are being made the subject of a review under sections 22 and 23(2) of the 1950 Act, I shall refer to these applications in this judgment by the shorthand "remission applications". I am conscious that one of the applications seeks a partial setting aside of the award as an alternative remedy and my shorthand description is intended to cover this aspect of the applications as well.
5. The judge in charge of the arbitration list in the Commercial Court assigned all these matters to the official referee and I was assigned all matters. The parties sensibly arranged for a summons for directions to be heard by me at which I ruled that the applications for further reasons and the remission and setting aside applications would be heard first. Once I had decided what parts, if any, of the award should be upheld and what if any further reasons should be supplied, I could then, at a second hearing, consider any surviving appeals which would be argued against the background of the sustainable parts of the finally reasoned award. It appeared appropriate to first clear away any challenge to the validity of the award, to resolve what reasons would be used for the purposes of the appeals and, in the light of these determinations, then hear the appeals themselves. Thus, this judgment is concerned with the applications for further reasons and with the applications for partial remissions and partial setting aside of the award.

6. The parties had given their consent to an appeal being brought in relation to any question of law arising out of the award. This consent was provided by clause 38.7 of the subcontract, which was in the familiar DOM/1 standard form. This provision provides:

"The parties hereby agree and consent pursuant to sections 1(3)(a) and 2(1)(b) of the Arbitration Act 1979 that either party

.1 may appeal to the High Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement; ..."

The arbitrator had been appointed under this arbitration agreement. It has now been clearly established, not the least in two official referees' cases, that this clause provides an effective granting of consent for an appeal to be brought against any question of law arising out of an award. Neither party challenged that position and I accept that the proposed appeals can be brought without the need for a "Nema" application to the court under section 1(3)(b) of the Arbitration Act 1979 for leave to appeal.

7. During the hearing, it became clear that the questions of law that both parties are seeking to argue when the appeals are heard had not been clearly identified. Both parties have served originating motions setting out their grounds of appeal. Since the Rules of Court do not require the precise questions of law that are to be argued to be spelt out and since leave to appeal is not required, there is no procedural reason why the questions of law should have been precisely formulated at this stage. However, in determining both the application for further reasons and, at a later stage, in considering the appeals, I must have in mind what the precise questions of law are that are to be argued and determined since I only have jurisdiction to order further reasons where: *"[t]he award does not or does not sufficiently set out the reasons for the award, the court may order the arbitrator to state the reasons for his award in sufficient detail to enable the court ... to consider any question of law arising out of the award."* (section 1(5) of the Arbitration Act 1979)

Moreover, an appeal can only be brought: *"(o)n any question of law arising out of an award made on an arbitration agreement ..."* (section 1(2) of the Arbitration Act 1979)

Thus, during the hearing of the applications and in this judgment, I have had to define what appear to be the questions of law raised by the two originating motions which set out the parties' grounds of appeal.

8. In summary, therefore, this judgment is concerned with three separate matters:
1. NHC's applications for further reasons in connection with 5 separate grounds of appeal;
 2. NCHC's 8 separate grounds for seeking remission and a partial setting aside of the final award; and
 3. The need to define the relevant questions of law raised by both NHC and CWS.

For convenience, I will deal with each group of questions of law separately, dealing with the three separate matters arising in connection with each group together.

9. It will be clear from this summary that NHC is mounting a sustained challenge to the arbitrator's award. This was underlined by the skeleton argument of Mr. Darling, NHC's counsel, in this passage: *"NHC makes no apology for contending that the award was thoroughly bad in procedure, content and result. It accepts that it has launched a root and branch attack upon it. The circumstances in which an attack of this kind is justified may be rare, but it will be NHC's submission that this is a thoroughly bad award."*

I see it as my function, in these circumstances, to give fuller consideration to the applications and the award than might otherwise have been given in section 1(5) and remission applications out of fairness to the parties, one of whom feels that the arbitral process has let it down and, equally, out of fairness to the arbitrator who has devoted considerable time and professional expertise to both the reference and his award and whose professional reputation as an experienced arbitrator in heavy construction arbitrations is in question.

1.2 The Structure Of The Judgment

10. I have structured this judgment in a way that deals with all applications on a particular topic in the award together and to group the topics so that I deal with them in this order:

1. Remeasurement topics (Part B, Section 3, paragraphs 40 - 97).
2. Delay and liquidated damages topics (Part C, Sections 4 - 5, paragraphs 98 - 146).
3. Quantification of loss and expense topics (Part D, Sections 6 - 10, paragraphs 147 - 227).
4. Discount and retention topics (Part E, Sections 12 and 13, paragraphs 228 - 235).
5. Overall conclusions (Part F, section 14, paragraphs 236 - 237).

In each topic, I have tried to define the question or questions of law which appear to arise, whether raised by NHC or CWS. These definitions are not final, since they have not yet been considered by the parties. They will, however, form the starting-point of a consideration of the appeals and of any argument as to whether a question of law is in fact being raised under any particular topic and, if so, what the relevant question is. I have set out in the last section of this judgment, in paragraph 237 below, the procedure that the parties are to follow prior to the hearing of the appeal so as to achieve a definitive list of questions that each party wishes to argue. I have set out in schedule 1 of this judgment an index to the topics I have considered, cross-referencing them to the applications and grounds advanced by each party in relation to that topic. I have also set out in schedule 2 a list of the questions of law I have defined out of the grounds of appeal advanced by both parties. These have been taken from the text of the judgment. Finally, in schedule 3, I have summarised my conclusions reached in this judgment, including the procedural directions that I have given in relation to the conduct of the appeals.

2 The Applicable Law - Summary

2.1 Applications for further reasons

2.1.1 The jurisdiction of the court to order further reasons.

11. The part of the Arbitration Act, section 1(5), which is concerned with the ordering of further reasons, reads as follows: "... if an award is made and, on an application being made by any of the parties to the reference- ...
(b) ... with the leave of the court,
it appears to the High Court that the award ... does not sufficiently set out the reasons for the award, the court may order the arbitrator ... concerned to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under this section, to consider any question of law arising out of the award."

2.1.2 The discretion to make an order

12. The jurisdiction to order further reasons gives rise to a number of questions as to what the appropriate approach of the court should be when determining an application made under it. The first question is what is the nature of the discretion that a court is required to exercise when dealing with an application. This question was answered by Staughton J. in *Michael I Warde v. Feedex International* when he stated: "Since the (applicant) does not have the consent of the (respondent), it will be observed that he needs both the leave of the court to make the application and, if he obtains that leave, an order of the court that further reasons be stated. ... (i)t was not suggested to me that any different considerations apply to an application for leave, and the application for reasons or further reasons if leave is given. The two processes are in practice one and the same application."

I agree with this analysis. However, the section does not give any further guidance as to what factors should determine what further reasons should be ordered and whether an order should be made for them to be given.

2.1.3 The use of extrinsic evidence

13. The discretion I have is, therefore, to order further reasons when a question of law is shown to arise which cannot be satisfactorily considered because the reasons already given are not sufficient. I cannot accept the submission of Mr. Darling to the effect that evidence is admissible in relation to all the applications made by NHC under section 1(5). He argued that that must be the case since, otherwise, it might not be possible to show that a question of law arises, or might arise since, otherwise, a party could be deprived of bringing an appeal merely because there was an absence of sufficient material to enable the question of law that might arise to be identified. However, extrinsic evidence is, in general, inadmissible. The reason why evidence is inadmissible is because both the parties and the court are confined to a consideration of the arbitrator's reasons for his award. This is clear from the language of section 1(5) of the 1979 Act itself which appears to confine the court to a consideration of the text of the award by the words: "[i]f it appears to the court that the award does not or does not sufficiently set out the reasons for the award ..."
14. The inadmissibility of such evidence is also clear from the decision of the Court of Appeal in the *Universal Petroleum case* in which Kerr L.J. stated: "The reasoning of Robert Goff L.J. in *The "Barenbels"* precluding the use of evidence extrinsic to the award on applications for leave to appeal, cannot be circumvented by applications under subsection (5)(b) and is therefore equally applicable to such applications. There is no relevant distinction between evidence given on affidavit or otherwise and information given to the court by counsel. In the same way as under subsection (5)(b) must therefore be decided exclusively on the basis of the contents of the award."
15. In reaching this view, I am aware that it appears to run counter to the view of Hirst J. in *Kansa General Insurance Co. Ltd. v. Bishopgate Insurance plc*. It also runs counter to the views of the authors of *Commercial Arbitration*. My view is, however, supported by Professor Rhidian Thomas. These different views can, to some extent, be reconciled if the situations in which evidence is admissible are confined to those where it is alleged that a particular submission was made to the arbitrator but not dealt with at all in the award and also, possibly, where potentially crucial evidence was adduced but was not referred to in the award at all. In such situations, the failure to allow evidence of what was argued or what evidence was adduced could constitute an injustice to the aggrieved party since there might be no means of conducting the appeal without further reasons and no means of persuading a court to order these in the absence of the additional evidence of what transpired at the hearing.
16. The earlier authorities in which such evidence was adduced were not cited to the Court of Appeal in the *Universal Petroleum case* but were cited to Hirst J. in the later *Kansa* case where he pointed out that if evidence was inadmissible, the result would be that the more inadequate the arbitrator's reasons, the more difficult it would be to obtain an order for further reasons. The *Universal Petroleum case* was not one in which either of these possible exceptions was being contended for and is not, therefore, conclusive as to such situations. Admission of evidence in such situations could be brought within the apparent prohibition of such materials created by the wording of section 1(5) of the 1979 Act because it would not be possible for it to "appear to the High Court that the award does not set out the reasons for the award" without such evidence. Thus, a total lack of reasons for a particular part of the award, as opposed to an insufficiency of reasons, could, on this reading of the Act, justifiably be shown to exist by extrinsic evidence.
17. This is an application in which some of the questions of law for which further reasons are sought are ones that are alleged to arise out of arguments or evidence not referred to by the arbitrator. I will consider evidence for the limited purpose of determining whether the award is silent as to allegedly crucial arguments or evidence, but otherwise will disregard the evidence filed for this application or for the remission application. It is worth recording that NHC has not applied for reasons, as opposed to further reasons, in these particular applications. This is because the view was taken that it was only apposite to apply for reasons in a situation in which the award

was totally unreasoned. However, the language of section 1(5), although not clear, suggests that a "no reasons" application is the appropriate one to make where, although the award is reasoned, the reasons are completely silent as to the particular question to which the application is directed. This is, at best a technical irregularity which I can and will disregard but it is a distinction which should be borne in mind by potential applicants under section 1(5) of the 1979 Act since evidence, if allowable at all, is only allowable where the particular part of the award contains no relevant reasons.

2.1.4 Leave to appeal not required

18. Mr. Darling also argued that the fact that the parties have given their consent to an appeal being brought should result in an application for further reasons succeeding since, otherwise, the appeal process consented to by the parties might be thwarted. I do not agree with that submission. The appeal process is still subject to the overall policy of the 1979 Act. As I see the position, in a case where leave is required, I am required to consider whether leave to appeal is likely to be granted before ordering further reasons. This is one factor influencing the exercise of my discretion which is not present in a case, like this one, where the parties have consented to an appeal being brought, thereby obviating the need to obtain leave. Although the parties have consented to an appeal on a question of law being brought, all other factors influencing the exercise of my discretion remain intact and are to be considered in the same way as they would have had to have been considered had leave been required.

2.1.5 Factors influencing the section 1(5) discretion

19. In this case, the relevant factors influencing a decision as to whether an order requiring further reasons include such factors as the perceived strength of the argument sought to be advanced, the degree of difficulty either party might have in advancing its' case without further reasons, the extent to which the party seeking reasons is responsible for the insufficiency of the initial reasons, the sum at stake relative to the overall sum awarded, whether the issues that would be raised in the argument concerned with the relevant question of law are to be raised in any event as a result of the hearing that is to take place on the appeal or the remission hearing, whether substantial delay in the implementation of the award will occur if further reasons are ordered and the extent of the insufficiency of reasoning displayed in the award.

20. The balancing exercise that is required has to be conducted against the background of the overall purpose of section 1 of the Arbitration Act 1979 and, in particular, the function within that scheme of orders made under section 1(5). This background was explained in a further passage of Kerr L.J.'s judgment in the *Universal Petroleum* case: *"The jurisdiction to order further or more detailed reasons under subsection (5)(b) should be exercised as sparingly as possible. Such orders involve a process of "to-ing and fro- ing" between the court and the arbitrator, with the consequential costs and delays before it is even known whether leave to appeal against the award will ultimately be granted. The effect of such orders is therefore to postpone the effective finality of what was intended to be a final award. Any excessive or unnecessary resort to such orders runs counter to the purpose and policy of the 1979 Act, as explained - in particular - in The "Nema" and The "Antaios" and is liable to bring the Act into disrepute.*

I do not regard the fact that these parties have given their consent to an appeal being brought as affecting the principles set out in this passage. Further reasons should still only be ordered as sparingly as possible. In consenting to an appeal being brought, parties are not consenting to any further derogation from the principles enshrined in the 1979 Act and, given its' language, parties are not able to further derogate from that section.

2.1.6 The amount at stake on any particular question

21. Mr. Darling contended that the relative size of the sum of money turning on the questions of law to which the further reasons might be relevant was not a factor to take into account since any sum, however small, might affect a parties' costs liability or recovery. He was at pains to confine his argument to an hypothetical situation. He pointed out that there might be in existence a sealed offer in a sum just above or just below the sum awarded. In such circumstances, if a question of law on which only a small sum of money turned was capable of being argued successfully, the resulting amendment to the sum awarded could bring that sum above or below the sum offered by the sealed offer when, previously, it had been the other side of the line.

22. I do not accept this argument of Mr. Darling. A sealed offer is made against the possible end result of an arbitration, including any judicial intervention in the process. If it be relevant, in considering whether to order further reasons, to consider the potential effect of a sealed offer, it would be equally relevant for the arbitrator to know in advance of his award what, if any, sealed offer had been made. In fact, neither the arbitrator, nor a judge dealing with the aftermath of an award, is allowed to know of the contents of a sealed offer. Moreover, neither may take the existence of a sealed offer into account as part of the consideration of a dispute or of an application for subsequent judicial intervention. There is no objection to either knowing of the existence of a sealed offer, but if one is in existence, that fact is immaterial to any consideration of the terms of any award or court order save as to costs.

2.1.7 Conclusion

23. I conclude that I should first identify what, if any questions of law arise and whether they are susceptible to further reasons. Once I have done that, I should then consider whether any question lacking sufficient reasons should be made the subject of an order for further reasons, having weighed up all the relevant factors for each potential question separately and then having conducted a similar balancing exercise whilst considering them all collectively.

2.1.8 "Question of law" and "sufficient reasons" - general

24. Three further matters need to be considered. These are what is meant by "a question of law" and by "reasons". In the light of the answers to these two matters, I must then consider what constitutes sufficient reasons to enable a question of law that arises to be the subject of an appeal.
25. These concepts are not defined in the 1979 Act. However, a court can only order reasons or further reasons where the existing reasons are not sufficient to allow a question of law to be argued. These requirements go to the court's jurisdiction to order reasons or further reasons and I must therefore identify each alleged question of law that arises out of the award and the insufficiency of reasons precluding its' satisfactory resolution by the court before I can even contemplate making an order.

2.1.9 "No evidence to support a finding" appeals

26. It is neither possible nor desirable to attempt a general definition of what a question of law is because the answer to the question; "what is a question of law?" varies depending on the context in which the question is asked. For example, a question of law, needed to found the jurisdiction of the Court of Appeal in an appeal without leave from an official referee which, unlike an appeal on fact, does not require leave to appeal or a question of law needed to allow judicial intervention in a public law context are not the same concepts as a question of law arising in the context of an appeal being brought from an arbitrator's award under the Arbitration Acts. An arbitrator is given unfettered exclusive jurisdiction both to determine what evidence should be considered facts are relevant to enable him to discharge his arbitral functions and also to make findings of fact. Thus, there is little or no scope for an aggrieved party to characterise an alleged absence of any evidence to support a finding of fact as a question of law.
27. This aspect of the content of a question of law in the context of an appeal brought under the Arbitration Acts has not been fully explored in the authorities but it is worth noting the judgment of Steyn L.J. in *Georgas S.A. v. Trammo Gas Ltd. (The Baleares)*. I drew the attention of counsel to the existence of this judgment during the hearing of the application, since it had not been cited. I could not, during the hearing, remember the name of the case but I made it clear that I regarded myself as being bound to regard it as persuasive in deciding which questions sought to be argued were, and which were not, questions of law. The relevant passage reads: *"It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact. In law the context is always of critical importance. The enquiry: 'Is it a question of law?' must therefore always be answered by the counter-enquiry: 'For what purpose?' What is a question of law in a judicial review case may not necessarily be a question of law in the field of commercial arbitration. In short the closest attention must always be paid to the context in order to decide whether a question of law arises."*

A little later in this passage of his judgment, Steyn L.J. continued: *"The power to review a finding of fact of a tribunal on the ground that there is no evidence to support it, and therefore that there is an error of law, is a useful one in certain areas of the law, notably in the administrative law field. But in the [limited] appellate jurisdiction of the court under section 1 of the Arbitration Act 1979 this concept has no useful role to play. It is inconsistent with the filtering system for the granting of leave to appeal which was created by the Arbitration Act 1979. In my judgment it has not survived the changes introduced by the reforming measure of 1979."*

These views of Steyn L.J. were, strictly, obiter, have not been fully explored in argument before me and could be said to be directed to those appeals where leave to appeal is required but not to those brought with the leave of the parties. This last objection is, I should have thought, unsustainable since such an appeal is, nonetheless, brought under the provisions of the 1979 Act and it is not possible to construe the words "an appeal" in section 1 as meaning a different judicial process, so far as "no facts to support a finding" appeal is concerned, where leave is required from the judicial process involved where leave is not required. However, I must bear Steyn L.J.'s views in mind in deciding whether or not to order further reasons, leaving full argument and a decision about the correctness of those views to the hearing of the appeal itself.

2.1.10 Mixed law and fact

28. The decided authorities concerned with appeals from arbitrators, particularly those concerned with the nature of the questions which may be considered on an appeal, do not deal with the problem of whether a question which is, or may be, one involving a combination of factual questions and legal conclusions may be the subject of an appeal under section 1 of the 1979 Act. A valuation dispute, particularly a complex one like this one, raises this problem in a stark form. The valuations that are required involve the use of such building blocks as "reasonable" and "fair" and also involve, in part, the use of what is sometimes described as "discretion". Often, as here, the questions raised in an attack on the valuation process include the overall question of whether the valuation was conducted within the framework of the valuation provisions of the contract conditions. All such questions are, essentially, questions of fact. The only question of this type which may, and I stress the "may", be characterised as a question of law is one which asks whether the valuation process adopted by the arbitrator was so far away from the process provided for by the contract conditions that no reasonable arbitrator could have arrived at the particular valuation or series of values that the arbitrator had included in his award.
29. A further series of questions involving, at best from the point of the view of the potential appellant, a mixed question, are those concerned with causation and as to whether the loss awarded has been shown to have been caused by a sufficiently established nexus. These sorts of question are also normally only capable of being raised in a "question of law" form in the judicial review form of whether the result determined by the arbitrator was

within the wide range of potential answers that a reasonable arbitrator could have provided and was not, in consequence, an answer which no reasonable arbitrator could have achieved.

30. Many of the questions of law which I have divined as arising in the appeal are of the type which raise mixed questions of fact and law or are not susceptible to an appeal on a question of law at all. At the hearing of the appeal, I will need to address myself to the preliminary question of whether I may hear and determine such questions at all.

2.1.11 Sufficient reasons

31. The 1979 Act does not give any guidance as to how a court should determine whether the existing reasons are sufficient other than by stating that reasons are insufficient if they do not enable the question of law that arises to be considered. Since NHC did not define the questions of law which arise in its' appeal, but only set out what were described as grounds of appeal in a somewhat diffusely pleaded originating motion, I have had to define the questions which appear to arise, consider whether they are questions of law and, where they are, to consider whether any aspect of the question creates difficulties of resolution without the reasons already provided being supplemented.
32. A further procedural difficulty was created by the nature of the application brought by NHC. The originating motion sets out a formidable examination paper of 94 further reasons that NHC sought to be posed to, and answered by, the arbitrator. At the hearing, the application was reduced to a still unmanageable list. On that occasion, 16 further reasons were sought. Many of these 16 applications were, on analysis, requests for further reasons in the form: "why did you find that fact?". Indeed, the reality was that NHC was seeking an order, in several of the applications, that the arbitrator should answer questions couched in the rhetorical form: "surely you should not have found those facts but, instead, surely you should have reached a different conclusion on the evidence?" It follows that many of the applications were seeking an order that the arbitrator should provide his reasoning and not his reasons. This type of application is not permissible both because it seeks the reasoning of the arbitrator and because any question to which such additional reasoning could be relevant could only be a question of fact.
33. It follows that many of the 16 applications made by NHC could not be contemplated on the short procedural ground that they did not seek further REASONS to assist in the resolution of a question of LAW. As for those applications which potentially relate to a question of law, the approach that I should adopt in deciding whether to accede to the application is to ask myself whether or not the court will be unable to answer the question without being provided with further reasons for the relevant questions of law arising out of the award. Only if an answer cannot be contemplated should I consider ordering further reasons.

2.2 Sections 22 and 23(2) Applications

2.2.1 The jurisdiction defined

34. The relevant provisions of the 1950 Act read as follows:
Section 22: "In all cases of reference to arbitration the High Court ... may ... remit the matters referred, or any of them, for the reconsideration of the arbitrator ..."
Section 23(2): "Where an arbitrator ... has misconducted ... the proceedings, ... the High Court may set aside the award made."
35. It is to be noted that NHC's primary application is for remission of parts of the award. This remedy is only available under section 22. This is not the "misconduct" section, which is section 23(2), which only allows a court to set aside the award. It is true that the judicial encrustations of authority on these sections over the years have elided the two sections and the two separate jurisdictions somewhat and that some arbitral behaviour which has been held to justify judicial intervention has been held to come within both sections. However, I will concentrate on section 22. This is because Mr. Darling accepted during the hearing that the remedy of setting aside was not applicable to these applications since, if the award was set aside, the parties would be left with no award at all. He also accepted that the nature of the disputes determined by the arbitrator, which interlock considerably, were such that a partial setting aside, with a remission of the rest of the award, was not practicable. Since all the grounds upon which remission is sought, except one, are ones which overlap with "misconduct grounds", the applications will only be considered as ones seeking remission under section 22 of the 1950 Act.
36. The situations in which a court will consider remission are now well-established, The guidelines are capable of being identified by a careful study of three comparatively recent Court of Appeal decisions: *The Montan , King v Thomas McKenna Limited and Makers Industrial Limited v. London Borough of Lambeth*. These guidelines have been helpfully summarised in a recent section 22 application decided by HH Judge Lloyd Q.C., *Miller Civil Engineering Limited v. National Rivers Authority (Yorkshire Region)*. Both parties agreed that Judge Lloyd's synthesis provides an accurate and helpful summary of the relevant principles that I must apply in dealing with NHC's applications and I will therefore set it out in full:
"From these cases I consider that the following principles may be extracted:
1. *Notwithstanding section 1(1) of the Arbitration Act 1979, the power to remit remains but it is not to be regarded as a backdoor method of circumventing section 1(1).*
2. *Whilst the power remains wholly discretionary it must be exercised in accordance with established principles.*

3. *Those principles permit remission where the subject matter of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and where it would be inequitable to allow an award to take effect without some further consideration by the arbitrator.*
 4. *Nevertheless the power to remit is concerned primarily with the manner in which the arbitrator's decision has been arrived at and not with the decision itself (i.e. as was said in **King v. Thomas Mckenna**: 'it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrator has made errors of fact or law and as a result have reached a destination which was not that which the court would have reached.)'*
 5. *There must therefore be a real risk of unfairness arising out of the conduct of the arbitration but it is only necessary to show that the conduct of the arbitration has taken a turn which is significantly unfair to one of the parties so that the result might be vitiated by significant unfairness."*
37. The only additional gloss that Mr. Black Q.C., counsel for CWS, sought to put on this summary, which I accept is one which is derived from the trilogy of decisions of the Court of Appeal to which I have referred, is that in applying the guidelines, I should keep in mind, firstly, that the court should take into account that the parties have chosen arbitration as the means of resolving their disputes, a form of dispute resolution in which finality predominates over the strict application of legal principle and, secondly, that the ultimate duty of the court is to enforce arbitration awards.
 38. It is vital to keep in mind that remission is a remedy for occasions when procedural and not substantive mishap has occurred. Thus, the complaint must relate to an alleged procedural wrong turning taken by the arbitrator and not to an alleged erroneous destination reached by the award. If the complaint is of the latter kind and concerns the contents of the award, the only remedy is, if it is applicable at all, one by way of an appeal. It is not usually a procedural mishap to decide the dispute having misunderstood the evidence or having reached a conclusion which is not supported by the evidence. If a result has allegedly been reached where there was no evidence to support the relevant findings of fact, the suggested error is often one where the aggrieved party cannot accept that the evidence before the arbitrator supported his findings. That is not a "no evidence" situation which only arises when neither party was even purporting to adduce evidence on the topic yielding the material findings under attack. In such extreme situations, a remission might be possible, but such a situation is not raised in any of these applications, despite NHC's contentions to the contrary.
 39. It follows that the potential overlap between misconduct and appeal is limited. However, all the remission applications made by NHC are mirrored by grounds of appeal. It is not permissible to seek to hedge one's bets by trying to raise a complaint as both a ground of appeal and as an application for remission in the hope that if several balls are thrown up, one will reach the target. A party must decide the precise nature of the complaint in advance and then only pursue the remedy appropriate to that complaint. In considering the applications for remission, I have sought to keep in mind the dichotomy between a complaint that there has been a mishap along the route from one that the arbitrator has arrived at the wrong destination.

PART B. REMEASUREMENT TOPICS

3. The Electrical Remeasurement

3.1 The Award

3.1.1 The reasoning summarised

40. The subcontract involved the installation of complex mechanical and electrical work for the Learning Resources Centre. The overall value of the measured work was, on CWS's view, £1,623,315.69 and, on NHC's view, £1,269,487.00. NHC instituted arbitration proceedings against the employer, John Moores University, under the main contract. This arbitration claim, with another arbitrator, included a claim for the value of CWS's subcontract work, albeit that the basis of valuing the work was different under the subcontract compared to that provided for in the main contract. The main contract arbitration was settled during the course of this subcontract arbitration hearing and Mr. Forde then allowed NHC to adduce further evidence concerning the main contract arbitration.
41. The arbitrator sets out the background to the remeasurement claim with some care. The subcontract required the work to be remeasured. There was no bill of quantities but there were two schedules of rates, one of which was, and one of which was not, a subcontract document. Remarkably, the parties did not appear to realise that the work was to be remeasured until after the work had been completed. The award states: *"In my view both parties are equally to blame for the difficulties concerning remeasurement. Each party was aware - or should have been aware - of the duties imposed by the contract. Each party employed competent people on site and in their head offices to deal with such problems. Unfortunately neither party realised - until long after the works on site had been completed - that it was a remeasurement contract. By that time, remeasurement on site was impracticable as the buildings were in occupation."* (paragraph 15.03)
42. The parties submitted figures for the remeasured work and its valuation which indicated enormous differences in the amounts claimed or allowed. CWS claimed approximately £200,000 above the tender figure and NHC approximately £186,000 below it, the original tender figure being £1,447,316.03. The arbitrator recorded that there was evidence that there had been 571 variations to the electrical work and 75 variations to the mechanical work. No omissions had been made to the main contract work by the employer, the architect or the mechanical and electrical engineer.
43. The arbitrator explained why a remeasurement was impractical. It would normally be undertaken by a surveyor for each party as work proceeded, by on-site measurements which would be recorded on drawings kept for the

purpose of recording the measurements undertaken to date. The remeasurements would then be undertaken from these drawings. Where revised rates were needed, these would be agreed at the time that the remeasurement was being carried out.

3.1.2 The subcontract provisions

44. The subcontract contains detailed provisions for the measurement and valuation of the work, largely in clause 17. The arbitrator realised that this part of the dispute would be difficult and time-consuming to resolve, even with the assistance of the parties' expert quantity surveyors. He grappled with the problems thrown up by this exercise by hearing argument and delivering an interim award dated 1st November 1996. This was concerned with answering various points of principle that the remeasurement exercise had highlighted. This interim award followed much work between the two parties' experts which the arbitrator had had a hand in. This preliminary work is described as follows:
- "47.00 The quantity surveying experts had difficulty in agreeing certain matters despite voluminous correspondence and despite a meeting with me on 21st August 1996 and a hearing was convened for 17th September 1996 to decide sundry matters.*
- 48.00 At the meeting ... I was asked to sit in with the quantity surveying experts, get a feel of the issues and differences between them and then provide the parties with an informal non-binding indication of the way in which I foresaw the remeasurement issue proceeding and this I did ...*
- 49.00 I attended [a meeting with the quantity surveying experts] and received evidence in verbal, fax and letter form from the parties.*
- 50.00 On 23rd September, as requested, I delivered to the parties my informal non-binding indication as referred to above, following receipt of which the parties agreed that certain matters should be heard as preliminary legal issues."*
45. The arbitrator, in appendix III of his award which stated on its face that it did not form part of the award, gave an extensive summary of his conclusions formed about the parties' experts' reports. This appendix is entitled "Arbitrator's Comments On The Experts' Reports". In this summary, the arbitrator commented that, at the meeting on 17th. September 1996, he proposed a procedure that could be used in the remeasurement but each party felt that the procedure could be damaging to its' case and declined the suggestion that that procedure be adopted.
46. The answers to the preliminary issues included these findings, an answer with a prefix "C" is an answer to a question posed by CWS and one with a prefix "R" is one to a question posed by NHC:
- "C2(1) Schedule of rates [schedules] SR1, SR2 and SR3 ... should be used for the remeasurement in accordance with clause 17 of the subcontract.*
- C3. In theory, quantities should be remeasured on site, but the parties' experts are agreed that this is impossible. The quantities for the completed work will have to be calculated by comparing the original tender drawings and the as installed drawings.*
- C5. Where there are differences between the Schedule of Rates (SR1, SR2 and SR3) and the Schedule of Rates prepared at a later date by [CWS], then SR1, SR2 and SR3 must prevail. However, it is permissible to have recourse to [CWS]'s schedule of rates to ascertain what is and what is not included in a particular rate within SR1, SR2 or SR3; to ascertain what was the intention of the parties; to resolve ambiguities or inconsistencies and to give effect to the commercial purpose of the schedule of rates.*
- C6. If the remeasured quantities cannot be valued in accordance with SR1, SR2 and SR3, are they are to be valued at fair rates and prices which means 'fair in relation to the original sums shown in the schedule of rates SR1, SR2 and SR3.'*
- R5. ... If [there is a change in the scope of the subcontract work which] involves different work it may be necessary to create new rates for new items but these new rates should be, where possible, analogous to the existing rates in SR1, SR2 and SR3 and the procedure and principles set out in clause 17 of the subcontract should apply.*
- R8. ... Because physical remeasurement is impossible the "as fitted" drawings are ... a useful tool for the ascertainment of the final subcontract sum.*
- R10(b) and*
- R10(c). If changes were outside the subcontract or were not instructed their value should not be included in the ascertained final contract sum."*
47. In the award, the arbitrator recorded that the remeasurement of the work had been complex for reasons associated with the existence of two schedules of rates. This complexity would have been mitigated had the problems created by the existence of two schedules of rates been appreciated earlier. He concluded that the overall volume of the subcontract work had increased, that the value of the remeasured work had to be set against the provisional sum items and that it was necessary to examine the provisional sums and the variations in order to arrive at a proper value of the remeasured work. He also found that the overall valuation of the work produced by the two experts was so far apart that he could only undertake the valuation himself in one of two ways, by starting from the figures produced by CWS's expert and adjusting them downwards or by starting with those produced by NHC's expert and adjusting them upwards. This was because it was impractical to remeasure the works himself.

48. For the electrical work, the arbitrator considered that the appropriate starting point were the figures of CWS's expert, Mr. Evans. These were clearly too high, based as all of them were on a fair valuation. However, he also found that the valuation of NHC's expert, Mr. Pickavance, were suspect for reasons he summarised in detail. These included a failure to value a number of variations and other work which should have been included. He concluded that some of the adjustments made by Mr. Pickavance had "very bizarre effects".
49. In view of the very large differences in the experts' figures, he arrived at his valuation by the following route:
1. He considered figures for the same work considered in the main contract arbitration. These included figures put forward by NHC and lower figures put forward by Ove Arup and Walfords, mechanical and electrical engineers giving evidence for the employer. The arbitrator noted that, on NHC's figures, the value of the mechanical and electrical work increased by £409,615.33 which appeared to him to be based on figures provided by CWS marked up by 7 1/2%. On the employer's figures, the value of this work had also increased, by £326,698.56, albeit, as the arbitrator noted, the employer's figures were based on the main contract method of measurement. The arbitrator found that, if an appropriate deduction was made for the mark up on CWS's figures used by NWC, there was a striking similarity between NHC's overall figure for electrical work and that put forward by the employer. This similarity was mirrored by a similarity in the original figure for this section of the work in the main contract and in CWS's subcontract.
 2. Supported by his analysis of the figures being considered in the main contract valuation, he concluded that there had been an increase in the electrical work, contrary to Mr. Pickavance's view and that he should use Mr. Evans' figures as his starting point and then adjust them downwards. This process he characterised as "rough justice" but he concluded that it was the best he could do given the widely conflicting evidence presented by Mr. Evans and Mr. Pickavance.
 3. He valued the electrical work in the overall sum of £773,240.31. This was less than Mr. Evans' figure of £909,354.69 but greater than Mr. Pickavance's figure of £613,324.00. This compares with the original subcontract sum of £723,796.80.
50. The arbitrator gave more detail about the method he had adopted in Appendix III to the award as follows: *"Because of the unreliability of ... [Mr. Evans] and the extreme complexity of the evidence of ... [Mr. Pickavance] I find it necessary to disregard much of the detail of the expert witnesses of quantum and make my own assessments of the value of the work, particularly the measured work, using the documents before me and the evidence of the lay witnesses - who were, after all, responsible for administering the contract in practice."*

The arbitrator also carried out detailed calculations. His award stated: *"Although I have used the headings referred to by Mr. Evans (in the summary of the valuation of the remeasured work contained in the award) my calculations (which are too detailed for inclusion) do not necessarily cover the same individual items and it is not therefore feasible to compare my figures for individual headings with those of Mr. Evans."* (paragraph 17.01)

3.1.3 The powers of the arbitrator

51. In addition to the valuation provisions of the subcontract that had to be applied to the facts of this subcontract in the way determined by the arbitrator in his unchallenged interim award, the arbitration provisions applicable to the dispute invested the arbitrator with these express powers: *"... the arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any payment, certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such payment, had been made or no such certificate, opinion, decision, requirement or notice had been given."* (Article 3.5)

3.2 NHC's Grounds For Remission

52. The attack on the arbitrator's award is made on two broad grounds: that the arbitrator relied on evidence that he should not have done and that he adopted the wrong method in valuing the remeasured work. The evidence that is challenged is that from Mr. Evans and from Ove Arup and Walfords, the employer's two mechanical and electrical engineers. The evidence from these engineers was allegedly taken from documents that came into existence for the purposes of the main contract arbitration and which had been, as NHC saw the position, introduced into the subcontract arbitration for purposes other than for use as a source of evidence of the remeasurement exercise. The wrong methods allegedly employed by the arbitrator were that he applied his own experience and expertise without warning the parties that that was what he was going to do and that he used a method of "rough justice" in arriving at the remeasurement value, a method not provided for by the subcontract valuation provisions as they had to be applied to this valuation exercise by the arbitrator in his interim award. NHC's conclusion was that the arbitrator's method of valuation constituted a departure from the method of valuation that had been settled by the arbitrator in that interim award.

3.3. Mr. Evans' Evidence

3.3.1. The alleged misuse of Mr. Evans' evidence

53. NHC challenges the use of, and reliance upon, Mr. Evans' expert evidence because, as NHC sees the position, the arbitrator's findings as to the wholly unreliable nature of Mr. Evans' evidence were such that it was procedurally improper for him to do anything other than ignore this evidence. This attack on the use of Mr. Evans' evidence arises because that expert was undoubtedly "a most unreliable witness", to use a description applied to him by the arbitrator.

54. It is necessary to recount in some detail the course of Mr. Evans' evidence. As is made clear by the arbitrator in Appendix III of his award, Mr. Evans' figures in his expert's report for the remeasured work were ones which he did not believe in and which had been put forward in the expectation that they would form the basis of negotiation. He had delegated most of his work to subordinates and was unable to justify the figures that he quoted. His answers in oral evidence were: *"frequently evasive and sometimes incomprehensible. He was not prepared (or able) to give straight answers to straight questions and I can put little reliance on much of his evidence"*. (Appendix III, paragraph E 4.01)

The arbitrator continued in the same vein in the award. His overall conclusion as to Mr. Evans' evidence is summarised in this passage: *"... much of Mr. Evans' evidence was not that of an independent expert but was biased in favour of his client, [CWS], to such a degree that some of his submissions might be considered merely as a basis for negotiation. This ... was entirely wrong when it comes to submitting expert evidence which [he] must confirm on oath. ... my doubts as to Mr. Evans' credibility applied more to the remeasurement than it did to the claim for loss and expense."* (paragraph 5.02)

55. On the 15th day of the hearing, CWS applied to amend the points of claim. The application to amend arose after some of the shortcomings of Mr. Evans' evidence had been exposed in cross-examination and was intended to correct them. This application was allowed by the arbitrator who stated during the hearing of the application that Mr. Evans' credibility had been damaged in his eyes and he could not but be aware of this when he came to weigh his evidence during the rest of the hearing.
56. Following this amendment hearing and ruling, there was a short adjournment and the hearing resumed nearly three weeks later. The arbitrator heard further evidence, including evidence from both expert witnesses.

3.3.2 NHC's submissions - Mr. Evans' evidence

57. NHC submits that it was perverse for the arbitrator to place any reliance on the evidence of Mr. Evans, let alone to use his figures for the electrical remeasurement exercise as the starting point for his own calculations. The arbitrator had reminded the parties in letters written to them during the course of the hearing, as part of continuing discovery applications by NHC, that it was for CWS to prove the figures in its' claim, to his satisfaction, with "full and proper evidence in support of [CWS's] claim." NHC's conclusion was that the arbitrator, in relying on the evidence of Mr. Evans in any way in arriving at his award concerning the value of the remeasurement work was doing something which flouted the perfectly correct directions which he had given himself. It was also to act in breach of any normal understanding of the usual standards of natural justice. Since the arbitrator had given no advance warning to NHC that he would be relying on Mr. Evans' evidence, despite the earlier, clear indications that he would not be relying on it.

3.3.3 CWS's submissions - Mr. Evans' evidence

58. CWS submitted that NHC's submissions were based on two fallacies. The first of these fallacies was that the arbitrator was bound to accept or reject the evidence of one or the other party's expert in its' entirety. The second of these fallacies was that the scepticism that the arbitrator had for Mr. Evans' evidence inevitably should have meant that he had to ignore Mr. Evans' evidence in its' entirety. I can paraphrase the approach that CWS submitted that NHC was contending for by adopting American terminology. On NHC's approach, the evidence of Mr. Evans should have been treated as if it had been "struck from the record." However, as CWS saw the position, the arbitrator had gone out of his way to remind himself of the imperfections of Mr. Evans' evidence. By way of example, he stated in one of many passages on the theme of the need for caution in using this evidence: *"... Mr. Evans, at an early stage of his evidence, admitted that his valuation of the remeasure was fundamentally flawed I have expressed considerable doubts as to the figures provided by Mr. Evans ..."*. (paragraphs 15.07 & 15.08)

After the arbitrator had expressed his doubts about Mr. Evans' evidence, doubts shared by CWS that had led to the successful application to amend its claim for the remeasured work, the arbitrator heard much further evidence from Mr. Evans and was entitled to place at least some reliance on his evidence, particularly as he had so clearly in mind that he had to use it, and rely on it, with caution.

3.3.4 The use made by the arbitrator of Mr. Evans' evidence

59. In my view, NHC's submissions overstate the reliance placed by the arbitrator on the evidence of Mr. Evans. The exercise that he had to conduct was two-fold: both a remeasurement and a valuation exercise, using a fair valuation method for many of the rates that had to be used. The parties had failed to comply with his direction that agreement should be reached on these matters so far as possible and, as he found, it was not practical for him to start the whole remeasurement and valuation exercise from scratch. The parties had brought the difficulty of achieving a remeasurement on themselves by not operating the contract procedures during the work and by not, through their experts, agreeing all, or even much, of the dispute. Thus, the arbitrator had to start from somewhere. He found that NHC's expert, Mr. Pickavance's starting point was wholly unrealistic, given that that expert's view was that the electrical works had not been varied when, as the arbitrator had found, they had been substantially varied. A further difficulty for the arbitrator was that, in his view, Mr. Pickavance had not really carried out a remeasurement at all.
60. Thus, the arbitrator started from both Mr. Evans' measurement figures and his valuation figures. He tested this decision by noting that the sum of all these figures, once uplifted by an appropriate percentage to take account of NHC's slice of payment for this work, had been put forward to the employer by NHC both in its' negotiations with the employer and in the pursuit of its' claim in the arbitration against the employer. He also tested this

decision by noting that the employer's experts appeared to have advised an overall value for the remeasurement work which approximated to Mr. Evans' valuation. The arbitrator also reminded himself of the possible difference in the valuation provisions in the main contract from those in the subcontract. Having reached this point in his fact-finding exercise, the arbitrator went through the whole of the work, making detailed calculations. He had heard much evidence, all of which he took into account in deciding how much to reduce each individual figure in Mr. Evans' calculations. He had heard evidence as to how Mr. Evans had used wrong methods of valuation and had gone about his valuation exercise incorrectly. The arbitrator then determined how the blemishes in Mr. Evans' valuation exercise should be removed or provided for in the reduction exercise that he carried out on Mr. Evans' figures. It must be remembered that the arbitrator was required to determine fair rates and to exercise his own professional judgment for many of the valuations he had to perform, given his view that many of the rates in schedules SR1-3 were inappropriate. As a final test of his approach, the arbitrator reminded himself that if the approach of Mr. Pickavance was adopted, it would have the result that NHC would have overpaid CWS about £100,000, a situation which he found to be both unlikely and unreal. His overall conclusions were, in those circumstances, ones arrived at by a procedure which cannot be faulted.

3.3.5 Conclusion - Mr. Evans' evidence

61. It follows that I do not accept NHC's analysis of the process that was used by the arbitrator in reaching his decision as to the value of the electrical remeasurement. The arbitrator did not adopt or rely on the evidence of Mr. Evans in any conventional sense. He determined a working method for his own calculations which involved starting from Mr. Evans' figures and then adjusting them using a variety of methods and sources for the individual decisions needed to make many hundreds of individual adjustments to the figures he had started with. In so far as he used, and relied on, the evidence of Mr. Evans in this process, he was entitled to do so. Mr. Evans had given evidence in the hearing, it had not been contended that Mr. Evans' evidence should be treated as not having been given at all and no unfairness resulted from a failure, if such it be which I do not accept, to inform NHC before the award was published that he was proposing to use Mr. Evans' figures in the way he did. The arbitrator was, in the end, required to value the work himself as if he was NHC acting as the main contractor valuer under the subcontract as the works proceeded. He was not merely an umpire whose sole function was to accept or reject the expert evidence presented to him. He had to value the remeasured work, using that evidence as the starting point for his own valuations. No procedural impropriety of any kind occurred.

3.4 Ove Arup and Walford's Evidence

3.4.1 The use of Ove Arup and Walford's evidence

62. This complaint also requires some further factual background to be understood. During the course of the hearing, the separate arbitration between the employer and NHC, being conducted by a different arbitrator, was compromised. NHC then applied, on day 11 of the hearing, to reopen its factual case and call factual evidence from a solicitor, who had been involved in presenting and preparing NHC's case in that arbitration, and from its' finance director. The arbitrator allowed the application, primarily because he felt he would get a better picture for the whole project from this evidence. The purpose of the evidence, from NHC's point of view, was to show that liquidated damages had been paid by it to the employer and had not been repaid in the settlement. In addition to the oral evidence from these two witnesses, NHC disclosed documents emanating from the main contract arbitration and from the negotiations which led to the compromise. These documents included documents in which NHC's claim was set out and in which the employer's experts' views as to the value of the electrical work were elaborated. These experts were from two different consultants, Ove Arup and Walford. These documents were put to the two witnesses called by NHC in cross-examination, following the arbitrator's ruling that they could be called as witnesses by NHC.

3.4.2 The use made of the main contract materials by the arbitrator

63. The arbitrator, in deciding to use Mr. Evans' figures as his starting point, was reassured in taking this stance because these figures were similar to those put forward by the employer's experts. The arbitrator did not adopt these figures, indeed he reminded himself that he had heard no firm evidence of the valuation process on which they were based. However, as the arbitrator put it: *"If, however, they are even approximately correct, the effect is that the employer's representatives (who are, or should be, unbiased as between NHC and CWS) considered that an additional £326,698.56 was allowable to NHC in respect of the mechanical and electrical work."* (paragraph 17.02)

3.4.3 The parties' contentions

64. NHC contends that the contents of reports and other materials prepared by Ove Arup and Walford were not admissible as evidence in the arbitration. The views contained in these documents were not subject to cross-examination of the authors of these documents. To rely on inadmissible valuation evidence from a valuer not called in the arbitration is sufficient of an irregularity to warrant a remission. Mr. Darling relied on *Mount Charlotte v. Prudential* in support of this argument. In that case, a rent-review arbitrator had inspected other premises, not the subject of evidence at the hearing, and had taken into account that evidence as part of the comparable evidence that he used to fix the revised rent for the subject-premises.
65. CWS contends that the evidence of the two experts' opinions was properly adduced at the hearing. The evidence was relevant in establishing how the compromise figure arrived at in the main contract arbitration had been negotiated and what its' constituent parts were. The breakdown of that figure had been the subject of cross-examination by CWS, using the disclosed documents as its' basis and, in any case, the evidence constituted a declaration against interest on behalf of NHC, given the circumstances in which the documents had come to be disclosed and had then been introduced into the arbitration.

3.4.4 Conclusions - Ove Arup and Walford's evidence

66. Two separate considerations arise, in the light of this history and these contentions. The first is whether the arbitrator can be faulted for considering the materials that contained in Ove Arup and Walford's documents and in the oral evidence given about their contents by NHC's witnesses. The second is whether the materials relied on by the arbitrator were being used as evidence by him in circumstances in which that evidence was inadmissible.
67. I can see neither unfairness nor procedural impropriety in the arbitrator considering these materials. It was NHC who introduced evidence as to what happened in the main contract arbitration and who voluntarily disclosed the relevant materials. No objection was taken to these witnesses being cross-examined in a way that enabled the arbitrator to determine what opinion these experts had formed as to the value of the electrical work and the general way that that valuation had been arrived at by those experts. Thus, there was admissible evidence of what opinions these experts had formed as to the value of the electrical work. I see no impropriety in the arbitrator considering this evidence for a different purpose than the purpose for which NHC called the witnesses who introduced it. Although these witnesses were called primarily to prove the breakdown of the compromise, the arbitrator's ruling indicated that these witnesses would be allowed to give evidence to provide essential background evidence of the main contract work and the way in which it was carried out. The witnesses were cross-examined on various issues. One subject of cross-examination concerned the contents of the employers' experts' views. Once evidence has been received, for whatever purpose, a tribunal may consider it in relation to all issues.
68. NHC rely on a further ground for contending that it was procedurally improper to consider these experts' opinions. This alleged impropriety was that, since the pricing method under the main contract was different to that applicable to the subcontract, it was wrong to place reliance on figures put forward for the main contract pricing process. This complaint, even if made out cannot constitute misconduct. It amounts to a complaint that the arbitrator had made an error of law in misapplying the valuation provisions of the subcontract to the evidence he had received. In other words, the complaint is that the evidence contained in the experts' documents should not have been used to support any finding as to the value of the subcontract work. In summary, therefore, the complaint is, that essential findings of fact were based on evidence which did not, and could not, support them. Thus, this complaint is not one that can found a misconduct or remission application.
69. The question as to whether the evidence was admissible or capable of being relied on, once it had been received into the arbitration, is a question of law. Questions as to whether evidence is legally admissible by an arbitrator obliged to observe the strict rules of evidence are questions of law. As is well put by Professor Rhidian Thomas: *"Rules of evidence being matters of law, they may equally give rise to an appeal under the 1979 Act if it can be established in the award that the arbitrator has erred."*
70. It is to be observed that the arbitrator did not rely on the evidence of the employers' experts' opinions as primary evidence of the value of the work. He carried out his own adjustment of Mr. Evans' figures, using the employer's experts' views as a means of reassuring himself that the figures he had arrived at were appropriate and, where a fair valuation had been needed, were fair.
71. A number of inter-related questions arise out of NHC's challenge that the arbitrator should not have used this material. These are the following:
1. Was the material being used as evidence at all? It is open to question whether the arbitrator was relying on the material as "evidence", even if it was inadmissible.
 2. Was the valuation exercise one which could only be undertaken by reliance on evidence in the strict sense? It is also open to question whether, in the exercise of fixing a fair valuation, the arbitrator is confined to material which is admissible, in the sense of being confined to material which is admissible in accordance with the strict rules of evidence.
 3. Was the material admissible evidence anyway? It is at least arguable that the relevant evidence was admissible as constituting, in context, a declaration against interest.
 4. Was the material admissible hearsay evidence? It is also arguable that the arbitrator was entitled to rely on the material as hearsay material relied on by him in his discretion under the provisions of the Civil Evidence Acts 1968 and 1972.
72. All these questions, if they arise at all, are questions of law and are not potential complaints of procedural impropriety. The introduction of inadmissible evidence, and the reliance upon such evidence, is only capable of constituting procedural impropriety if no reasonable arbitrator could have acted in the way complained of. The arbitrator's conduct is nowhere near being in that category, even if, which is to be determined on the hearing of the appeal, the use of the materials constituted reliance upon inadmissible evidence.

3.5 Valuation Method

3.5.1 The use of the wrong method of valuation

73. The suggestion that the wrong method of valuation was used by the arbitrator arises from his taking as his starting point, the figures put forward by Mr. Evans in his evidence, and then adjusting them downwards. The alleged error in the use of this process was said to have been compounded by the arbitrator's use of discretion, his own experience and "rough justice" when adjusting these figures.

3.5.2 Conclusions - valuation method

3.5.2.1 General conclusions

74. NHC alleges that these working methods both flout the requirements of the contract and are fundamentally wrong and unfair. The argument points to the valuation provisions of the subcontract conditions which provide for the ascertainment of the Contact Sum (clause 21.8.1.), using the processes of "calculation" (clause 21.9) and "computation" (clause 21.8). NHC also alleges that, although article 3.5 gives the arbitrator wide powers, these powers are adjectival, that is they are subsidiary and procedural powers whose purpose is to facilitate the processes of calculation and computation. They do not allow a wider, looser and more subjective process of valuation to be adopted than that already spelt out in detail in clause 21.
75. In dealing with this ground of complaint, it is necessary to read the arbitrator's reasons, which set out his valuation method, in context. It has to be kept in mind that the arbitrator could not measure the work, in the sense of making a visual ascertainment of quantities and that he had to decide which parts of the work were sufficiently comparable to schedules SR1-3 to enable particular rates to be selected from those schedules. He also had to undertake a fair valuation for those parts of the work where no appropriate or comparable rate existed, albeit that the fairness required to be used had to be "in relation to the schedule of rates SR1-3", the valuation method identified in the interim award. These requirements arose from the terms of the subcontract as they were to be applied to the work carried out. They also arose from his findings set out in his interim award. It follows that the arbitrator inevitably had to undertake an element of subjective valuation since any valuation process involving "fairness" as an element in it contains a subjective element in its working through, albeit that that subjectivity must be informed and based on the admissible evidence and other acceptable materials that the arbitrator has received as part of the reference. Thus, any computation and calculation will necessarily, to a greater or lesser extent, involve a subjective element.
76. Moreover, NHC reads too much into the arbitrator's words in suggesting that he has undertaken a purely subjective and arbitrary valuation method. Four particular passages in the award are highlighted by NHC. I will deal with each of these passages and my interpolation of them, taking each strictly in its context in the award.

3.5.2.2 Conclusions - specific complaints

77. **1. Complaint:** The use of the arbitrator's personal experience in evaluating evidence. Passage in the award: *"Furthermore, my experience tells me that there is a very strong possibility that a contract with 571 variations is very likely to show an overall increase."* (paragraph 17.05)
- In this passage, the arbitrator sets out the approach he adopted to the evaluation of Mr. Pickavance's evidence and in his weighing up of the strength of that evidence in comparison to Mr. Evans' evidence. He was, in effect, determining, on the balance of probabilities, whether or not the work had been varied, using his professional expertise as one of his evaluating tools. Parties engage a professionally qualified arbitrator for just that purpose, to enable the professional evaluation of expert evidence to be undertaken by someone with the same professional training as the qualified witnesses whose evidence is to be evaluated.
78. **2. Complaint:** The use of "rough justice" in the valuation process. Passage in the award: *"I shall use Mr. Evans' figures as a basis but adjust his figures downwards to take account of his excessive claims. This may be considered 'rough justice' but it is the best I can do, bearing in mind the widely conflicting evidence of the parties' experts."* (paragraph 17.06)
- In this passage, the arbitrator is explaining that the parties' failure to carry out a contemporary remeasurement of the work as work proceeded, coupled with the experts' complete failure to reach agreement with each other on any aspect of the remeasurement process, had the inevitable result that the computation exercise would not be as precise or structured as it would have been had one or other of these failings not occurred. It is in that sense that the remeasurement is to be regarded as containing an element of "rough justice".
79. **3. Complaint:** The use of discretion in the valuation process. Passage in the award: *"Having examined the figures submitted by Mr. Evans, I assess the value of the electrical services to be £772,240.31"* (paragraph 17.07)
- In this passage, the arbitrator is merely summarising the process of remeasurement he has had to undertake. This process inevitable involved an element of discretion, there being no "right" answer to many of the exercises involved, merely a range of answers within which a permissible figure could be chosen. This process depended on the arbitrator's informed use of his discretion, based on all the evidence he had received during the reference.
80. **4. Complaint: The valuation of "uninstructed work" and "not approved work".** Passages in the award: *"I allow [CWS] the items of 'uninstructed work' etc. which Mr. Pickavance would wish to deduct."* (paragraph 15.10) *"I feel [Mr. Pickavance] has taken too rigid a stance where variations were not automatically approved by Ove Arup."* (paragraph 16.02(b))
- This ground for seeking a remission is based on the false assumption that the arbitrator has valued work which his findings had made clear should not be valued. However, the arbitrator is using the expression "uninstructed work" as a convenient shorthand to describe work which Mr. Pickavance suggested in evidence was uninstructed but which, as the arbitrator found, was instructed. Equally, he found that the relevant "unapproved work" was properly authorised variations by NHC although it had not been the subject of an official approval by Ove Arup.
81. The evidence put before me by NHC included CWS's closing submissions to the arbitrator. It is clear from these submissions that the work to be installed was, initially, only shown on schematic drawings which did not show the exact runs of wiring and pipework, particularly where these had to deviate off-line to avoid other features of the building that had been constructed. Mr. Pickavance described these additional lengths of work as being

uninstructed since they did not appear on the schematic drawings, however, the arbitrator found that these lengths were as much instructed as the straight-line runs depicted on the schematic drawings. Such a finding is fully and wholly within his terms of reference and addressed an issue which the parties had left to him. If that finding could be characterised as having been arrived at following procedural irregularity, no arbitrator could ever be confident of avoiding that criticism.

3.5.2.3 Overall conclusions

82. The submissions of NHC came close to a suggestion that the arbitrator had only one of three options: to accept one or the other expert's evidence in its entirety or to reject both experts' evidence. However, the arbitrator had a much wider role, particularly given his article 5 powers. This overall role was to remeasure the work himself, using such evidence and permissible materials that he had been provided with as he chose to use. Of course, he had to act fairly and could not take into account material not introduced by the parties without prior notice. But, if the procedure adopted was fair, the arbitrator was free to pick and chose the bits of the evidence of each expert that he regarded as appropriate.
83. It follows that NHC's submissions distorted the use made by the arbitrator of the evidence, erroneously described both the valuation methods he adopted and the valuation process provided for in the subcontract as interpreted in the interim award and incorrectly suggested that the procedure adopted was unfair and procedurally flawed.

3.6 The Application For Further Reasons

3.6.1 NHC's grounds

84. The notice of appeal puts forward two grounds as being relevant to the application for further reasons in relation to the remeasurement exercise:
1. The remeasurement of the electrical work was not undertaken, as it should have been, on the basis of schedules SR1-3. Indeed, the process of valuation adopted was not a remeasurement at all.
 2. The remeasurement of the mechanical work included within its scope "uninstructed work" and the electrical work "not authorised work" which, on the arbitrator's stated method of valuation in his interim award, should not have been included.
85. It is clear, from the application for remission dealing with this topic, that NHC's complaint is that the interim award is thought to have provided for a remeasurement that relied on the schedule of rates SR1-3. In fact, the arbitrator took a different approach. He started starting from the figures put forward by Mr. Evans. He then adjusted them using material from schedules SR1-3 and then concluded that the many changes to the work necessitated a fair valuation in many instances. In order to undertake that part of the valuation, the arbitrator used, in addition to the materials adduced in evidence from the two experts, material drawn from the experts relied on by the employer in the main contract arbitration, material submitted by NHC to that arbitration process and his own experience as a quantity surveyor. It is that composite valuation exercise that is challenged.

3.6.2 Inappropriate Grounds of Appeal

86. The first of the grounds that I have summarised is not readily ascertainable from the grounds of appeal. These merely contend, laconically, that: *"The arbitrator has erred in law in failing to adhere to his previous interim award of 1st November 1996."*
87. The grounds end with this general catch-all: *"NHC is seeking further reasons from the arbitrator and may seek to supplement the grounds and basis of this appeal on receipt of any further reasons."*
88. It is not sufficient for a party to set out a very general ground of appeal allied with a wide-ranging application for further reasons. There were originally 14 separate applications for further reasons relating to the remeasurement exercise alone, albeit that these were reduced to 5 separate applications at the hearing. With some reluctance, I am prepared to treat the question of law arising out of the award as encompassing the question I have formulated. The party seeking further reasons and seeking to argue a question of law should not expect to be able to put into the original application a wide-ranging and general question and then expect the court to allow that party to "re-group" after preliminary skirmishing in procedural applications.

3.6.2 The questions of law arising

89. These two grounds give rise to these possible questions of law:
1. Is *"uninstructed work"*, referred to in paragraph 15.10 of the award, and *"not authorised variations"* referred to in paragraph 16.02(b) thereof, work which fell within the type of work which was not to be included in the remeasurement exercise described in Answer 10(c) of the interim award?
 2. Is the remeasurement process described by the arbitrator in paragraphs 15 and 16 of the award one which complies with the remeasurement provisions of the subcontract as interpreted in the interim award dated 1st November 1996?
 3. Did the arbitrator, in referring to valuation materials emanating from Ove Arup and Walford, rely on inadmissible evidence?

3.6.3 The further reasons sought

90. The further reasons sought are these:
- "Not a Remeasurement*
- 62. The reasons for the finding in paragraph 15.04 that huge differences between the figures submitted by the two experts on quantum entitles the arbitrator to make his own assessments.*

85. The reasons for the finding implicit in paragraph 17.7 that when valuing the electrical services, the headings in the contractual schedule of rates SR1-2 are not to be followed.

86. In relation to the itemised elements and figures set out in this paragraph, the reasons for the finding in paragraph 17.07 of the values in the right hand column [which sets out the value of each heading of the remeasurement exercise, such as "Miscellaneous Trunking and Trays"]. NHC hereby asks for the sight of the calculations referred to in this paragraph.

Uninstructed Work

70. The reason for the finding in paragraph 15.10 that CWS was entitled to monies in respect of "uninstructed work" etc.

78. The reasons for the finding in paragraph 16.02(b) that Mr. Pickavance has failed to include variations and the reasons for the finding that they should have been included."

3.6.4 Jurisdiction to make the order sought

3.6.4.1 Introduction

91. As I have already made clear, the jurisdiction to order further reasons only arises if:
1. The award does not sufficiently set out the reasons for the award;
 2. Further reasons are needed to enable the court to consider the relevant question of law.
92. In my view, these two preconditions do not arise for any of these applications for further reasons. I will deal with each application separately.

3.6.4.2 Not a remeasurement

93. **62.** The finding referred to is a finding of fact. The only relevant question that the finding could be relevant to is: "why did the arbitrator value the work in the way he did?" It has to be borne in mind that the arbitrator also found that the appropriate starting point for the remeasurement exercise should be one of the expert's valuations and he also made a finding as to what was to be the appropriate means of moving from this starting point to the final valuation. These were findings of fact. It follows that any further reasons to explain why the arbitrator found that he should make his own assessments could only have relevance as part of an enquiry as to why the arbitrator concluded that he should value the work in the way he did. This is a question of fact. It is therefore not necessary for me to consider whether NHC is correct in asserting, in the application, that the arbitrator did, in fact, "make his own assessments". I have grave doubts as to whether the process of adjusting Mr. Evans' figures in a largely downwards direction in the way that the arbitrator did is correctly described as a process of "making his own assessments". A more appropriate description would be: "making assessments based on the opinions of Mr. Evans and on the evidence and other materials received at the hearing".
94. **85.** Any finding that the rates in schedules SR1-3 were not to be followed is a finding of fact. The arbitrator had already determined in his interim award that these rates were only applicable and were only "to be followed" (to use NHC's not wholly appropriate language) where the work could "be valued in accordance with" those schedules. There could be any one or more of many reasons why the schedules could not be followed, each time a decision was taken that one of these reasons was present, the arbitrator made a finding of fact. Further, the finding that is said to arise, albeit by implication, is that schedules SR1-3 were not to be followed. This finding does not arise from the award. All the arbitrator stated in the award that he had done was to take Mr. Evans' quantities and rates as a starting point. The adjustment process, in many instances, would have used the appropriate entries in the schedule of rates. In other words, the process of adjustment, in many instances, would have been to apply the appropriate rates taken from schedules SR1-3 to the quantities taken from Mr. Evans' figures.
95. **86.** This is the only one of the three applications concerned with the remeasurement process which is directed to the three potential questions of law which I have identified as potentially arising. However, in my view, the arbitrator's reasons are already sufficient to enable these questions to be answered, even if I am persuaded that they are questions of law arising out of the award. The arbitrator's overall method is clearly identified and the detail sought by this application would do no more than identify which factual path he took for any particular finding of fact which he had made whilst giving effect to that method of valuation. Thus, as a further reason for rejecting this application, I rely on the fact that the only questions to which the detail sought could be relevant, which amounts to the large amount of workings constituting the arbitrator's valuation exercise, are questions of fact.

3.4.6.3 Uninstructed work

96. **70.** This application is seeking further reasons in relation to a finding which, if any question arises at all, give rise to a question of fact. This can be seen if the relevant part of paragraph 15.10 of the award is set out. This reads: "*The parties are not too far apart in their respective valuations for the mechanical services. Mr. Pickavance's figure is: £671,683.00 (less discount)*

I am aware that Mr. Pickavance's figure is subject to a number of qualifications which would tend to reduce it further but I allow [CWS] the items of "uninstructed work" etc. which Mr. Pickavance would wish to deduct."

It is quite clear that the arbitrator is making a finding that the work which had been stated by Mr. Pickavance in his evidence and in his reports prepared for the hearing to be uninstructed work was, in fact, instructed work which fell to be valued as being additional to the original subcontract work. The use of inverted commas and the

reference to work which had been compendiously referred to as "etc." shows that the arbitrator was making a finding that: "work described as 'uninstructed work' was, in fact, instructed work". Thus, no question of law arises.

97. 78. This application is similar to the one I have just dealt with. In paragraph 16.02(b) of his award, the arbitrator had made a finding of fact that items of work were variations and should be valued separately. This was work which Mr. Pickavance characterised as not being varied, or extra to the subcontract, because it had not been authorised. The arbitrator concluded that these variations had been authorised, albeit that they had not been "automatically approved by Ove Arup". His conclusion was that they had, however been authorised in some other way. This is a finding of fact and no question of law arises. The second part of the application is seeking to obtain from the arbitrator his reasoning process for making findings of fact. This application is as far away from what a court is entitled to order an arbitrator to provide, by way of further reasons, as it is possible to imagine.

PART C. DELAY AND LIQUIDATED DAMAGES

4. Delay Caused By CWS's Sub-subcontractors

4.1 NHC's Grounds For Remission

98. There are four separate grounds upon which a remission is sought by NHC:

1. An extension of time of 2 weeks was awarded on the grounds that a particular subcontractor caused this delay. The arbitrator held that that subcontractor was effectively a nominated subcontractor although not described as such in the relevant documents. In consequence, a delay had been caused by "a relevant event" as described in the subcontract, entitling CWS to an extension of time. The possibility that this delaying subcontractor should be treated, as if it had been a nominated subcontractor for the purpose of considering CWS's entitlement for an extension of time, was not argued for by CWS and was an argument that NHC had had no opportunity of dealing with at the hearing.
2. The arbitrator, in assessing whether NHC was entitled to an extension of time, did not apply the extension of time contractual provisions but used "his discretion".
3. The arbitrator ignored or disregarded evidence which showed that at least some of the delay caused to CWS for which it was granted an extension of time was, in fact, caused by one of its' own suppliers, called TSP, for which it was not entitled to an extension of time.
4. The arbitrator's award was inconsistent in that it awarded an extension of time of 21 weeks yet only awarded additional loss and/or expense for 19 weeks.

4.2 The Factual Background

99. The arbitrator had to deal with an overall delay period of 24 weeks. He found that the vast bulk of the delays were due to delays to the steelwork and by other subcontractors of NHC. However, the arbitrator found that some delay was caused in the later stages of the subcontract by these subcontractors of CWS who had been responsible for the book detection system and the security desk. One of those subcontractors was called 3M. However, the arbitrator found:

"3M (who was, indeed, a subcontractor to [CWS] but, for the reasons referred to in paragraph 4.07 below, I do not find [CWS] to blame for these delays." (Paragraph 4.03).

"... [CWS] was also delayed to some degree by the following - who were his own subcontractors: ...

(v) Delay due to the Book Detection System and the Security Desk (again, although 3M was [CWS's] subcontractor, [CWS] was forced to use 3M because the other University buildings used the same system)." (Paragraph 4.07).

"... the Desk and the Security Systems were provided by [3M] who (although they were theoretically domestic subcontractors of [CWS], were in effect NOMINATED by the [employer] - [CWS] could not change them nor control them. For example, for all practical purposes, an employer's selected contractor and, when considering the question of delays, 3M should be considered as a nominated subcontractor and not CWS's domestic subcontractor." (Paragraph 4.07).

100. The consequence of this finding was: *"... this delay was (in effect) caused by "nominated subcontractors". I consider that it qualifies for extension of time. This two week period of delay SHOULD have been granted to NHC who SHOULD, in turn, have allowed an extension of time to CWS. In my judgment, this two week extension reduced CWS's liability for Liquidated and Ascertained damages but does NOT qualify for costs. (I am aware that arguments can be put forward which may run counter to this decision but I have used my discretion, judiciously, as I am satisfied that this decision provides justice to both parties)." (Paragraph 4.08).*

101. In addition to these findings, the arbitrator awarded CWS an extension of time of 21 weeks and, additionally, awarded loss and expense for 19 of those weeks. NHC alleges that the award is inconsistent in that the arbitrator appears to have awarded a period of 21 weeks with costs for the electrical work, 20 weeks with costs for the mechanical work and then concluded that only 19 weeks overall should carry costs. Against this, CWS alleges that the inevitable consequence of the arbitrator's findings should be that all 24 weeks should carry costs, alternatively that 21 weeks should carry costs. NHC makes its' complaint both by way of an application for a remission and by way of an appeal arising out of questions of law whereas CWS only relies on the appeal route for its' riposte.

102. The award dealt with loss and expense at great length. In paragraphs 3 and 4, the arbitrator dealt with the topic of CWS's entitlement in general terms and concluded as follows: *"I consider that [CWS] is entitled to 21 weeks extension of time of which 19 are 'with costs'." (paragraph 4.09)*

This finding could not be clearer. However, NHC points to the findings in relation to individual time slices. These were set out in paragraphs 8 and 9 of the award. The individual findings were as follows:

Mechanical Prolongation

1. *Delaying/disrupting event 9: 2 weeks*
2. *Ditto for event 17: 7 weeks*
3. *Ditto for event 26(i): 5 weeks*
4. *Ditto for event 26(ii): 1 week*
5. *Ditto for event 26(iii): 5 weeks*
20 weeks

Electrical Prolongation

1. *Delaying/disrupting events 9 & 15: 6 weeks*
2. *Ditto for events 17 & 28: 10 weeks*
3. *Ditto for events 73,76,79, 109 & 110: 5 weeks*
21 weeks

The arbitrator explained in the award this apparent disparity by stating that he had used his experience and discretion judiciously in determining that, overall, the relevant period of delay carrying costs was 19 weeks.

103. In considering NHC's complaints, it is worth pointing to the passage in the award where the arbitrator stated that he had reduced the extension of time period claimed from 24 weeks to 21 weeks because, at least in part, he had reduced the claimed extension for event 17 by 3 weeks (paragraph 8.06). He also pointed out that it was perfectly possible for a contractor or subcontractor to suffer loss and expense because of disruption even though there was no delay. The argument that now arises in considering NHC's complaint is whether it is possible for the extension of time and loss and expense provisions in the subcontract to operate conversely so as to leave a subcontractor with a period for the recovery of loss which is shorter than the period for which an extension of time has been given and whether it is possible for the sum of all delays to be less than the summation of the individual parts of that overall delay. It is also a matter of argument whether the reduction of 24 to 21 weeks and for the further reduction to 19 weeks for recovery for loss was undertaken by recourse to the contractual machinery or by use of a process of discretion. If the latter was used, these further questions arise: is such a process allowed to an arbitrator when making determinations under clauses 11 and 13 of the subcontract conditions?
104. NHC had put forward a counterclaim in the arbitration. This was based on the contention that, for a period of 5 weeks from 13th January 1994 until 18th February 1994, the only reason why NHC could not hand the building over to the employer was because of CWS's delay in completing the subcontract. The damages claimed were under three heads, of which two failed because the arbitrator found that the loss claimed had not been incurred. However, he found that the claim for site overheads succeeded for 3 of these 5 weeks. He arrived at this period by granting CWS an extension of its' subcontract for 21 weeks of the 24-week period claimed. This period included the 2-week period of overrun caused to both the main contract and to CWS's subcontract by 3M. Had the arbitrator not granted CWS this additional 2-week extension, the damages he awarded to NHC would have been for a 5-week period, being an additional £10,,572.48.
105. So far as the 3-week period at the end of the subcontract period, for which CWS recovered no extension of time, is concerned, the arbitrator found as follows: *"... I have decided that the delays referred to in paragraphs 4.07(i),(ii),(iii) and (iv) caused a total delay to [CWS's] subcontract of three weeks (over and above [NHC's] concurrent delays) and that this period of delay of three weeks lies at [CWS's] door."* (paragraph 4.09)
106. The arbitrator then explained why he had reduced the period for recoverable loss from 21 to 19 weeks (see paragraph 100 above for the relevant quotation from the award). The award also explained that CWS was responsible for 3 weeks, as opposed to 5 weeks, of the delay caused to NHC's completion of the main contract as follows: *"I am satisfied that [CWS] did delay [NHC] by three weeks and I must therefore consider what fair and reasonable sum should be paid by [CWS] to [NHC] in respect of [NHC's] costs during the 3-week delay period (which I have assessed as being during time-slice events 17 and 28)." (paragraph 13.02)*
107. The conclusion reached by the arbitrator was, therefore:
 1. CWS was entitled to an extension of time of 21 weeks of the period of delay of 24 weeks in completing the subcontract.
 2. CWS was entitled to additional loss and/or expense for 19 of the 21 weeks for which it had obtained an extension of time.
 3. NHC was entitled to additional loss and/or expense from CWS for the period of delay of 3 weeks caused by the prolongation of the subcontract by the period of 3 weeks for which no extension of time had been granted. NHC's loss was incurred in weeks 56 to 58.

4.3 Provisions of the Contract

108. It is necessary to consider the relevant provisions of the subcontract. These are:
"... if ... it becomes apparent that the commencement, progress or completion of the subcontract Works or any part thereof is being or is likely to be delayed ... [and] if the contractor properly considers that: ... any of the causes of the delay is an act, omission or default of the contractor, his servants or agents or his subcontractors ... (other than the

subcontractor, his servants or agents) or is the occurrence of a Relevant Event; ... then the contractor shall ... give an extension of time ..." (clause 11.1 and 11.3)

"A relevant event shall mean the occurrence of any of the matters set out in the relevant provisions of the main contract for which the contractor may be entitled to claim an extension of time for completion of the main contract." (clause 11.10)

"The following are the Relevant Events ... delay on the part of nominated subcontractors or nominated suppliers which the contractor has taken all practicable steps to avoid or reduce ..." (clause 25.4 of the JCT main contract conditions)

109. Clause 25.4 of the main contract conditions also defines other "Relevant Events" some of which might have provided a basis for an extension of time of the main contract in the light of the arbitrator's findings of fact already summarised. These included the need to comply with instructions issued by the architect (clause 25.4.5), not receiving in due time necessary instructions (clause 24.4.6) and the supply of materials by the employer which the employer had agreed to supply (clause 25.4.8.2).
110. The relevant payment provisions of the subcontract provide:
"If the regular progress of the subcontract Works is materially affected by any one or more of the Relevant Matters ... the agreed amount of any direct loss and/or expense thereby caused to the subcontractor shall be recoverable from the contractor as a debt.
... A Relevant Matter shall mean any of the matters set out in the relevant provisions of the main contract." (clauses 13.1 and 13.3)
111. "Relevant Matters" are defined in clause 26.2 of the main contract conditions. It is to be observed that the "matters" defined in that clause are not identical to the "events" defined in clause 25 of the main contract. In particular, there is no equivalent provision covering nominated subcontractors in clause 26 to that found in clause 25. This opens up the possibility of a subcontractor in the position of CWS recovering an extension of time for delay caused by a nominated subcontractor but not recovering additional loss and expense. The subcontract also provides, in clause 13.4, for payment by the subcontractor to the main contractor of any direct loss and/or expense caused by the regular progress of the main contract Works being materially affected by any act, omission or default of the subcontractor.

4.4 The Parties' Grounds Of Appeal

112. Both parties are raising grounds of appeal that are alleged to arise out of the arbitrator's findings relating to this topic. NHC's grounds of appeal are, in summary:
1. 3M was not a nominated subcontractor and should not have been regarded as the equivalent of one. The subcontract did not distinguish between different sub-subcontractors and there was no basis for treating the effects of delay caused by one any differently from the effects of delay caused by others.
 2. Once the arbitrator had found that 3M caused a delay in the completion of CWS's work which, in turn, delayed the completion of the main contract by 2 weeks, it followed inevitably that CWS was liable for the loss that NHC proved had been caused as the consequence of a prolongation of the main contract by this period of time.
113. CWS also has grounds of appeal relating to this topic which are, in summary:
1. There was no basis for finding that CWS was not entitled to recover its costs incurred as a result of the 2-week prolongation of the subcontract caused by 3M's delayed completion, once the arbitrator had granted CWS an extension of time for that event.
 2. The arbitrator awarded CWS no costs for the 2 week period following an exercise of his discretion not to do so. The arbitrator was not entitled to exercise such a discretion, his only power was to apply the subcontract valuation and payment provisions, once he had found that CWS had been caused delay by a "Relevant Event".
114. It is also clear from CWS's submissions, addressed on the hearing of the remission application, that it has an alternative ground of appeal, or more strictly, an alternative ground for upholding the arbitrator's finding that CWS was not liable for NHC's additional site costs incurred in the 2-week period that it was delayed by 3M. This is expressed in CWS's skeleton as follows: "The arbitrator did not find that 3M was a nominated subcontractor. He found that 3M had been selected by LJM and that it would have been appropriate for LJM to grant a two week extension to NHC. NHC was claiming an extension beyond the material dates in its arbitration with LJM. If, therefore, the delays of 3M would otherwise have caused CWS to delay NHC, the extension would alleviated CWS of that liability."
115. CWS has a further ground of appeal, which is to the effect that the arbitrator erred in only granting it a 21-week extension rather than a 24-week extension. The 3 weeks deducted from the overall period of delay for which no extension of time is said to have been deducted despite there having been no evidence to justify this deduction. The deduction occurred because of the deduction of an unidentified period of 3 weeks from the 13-week time-slice attributed to event 17 for mechanical work (which spanned weeks 10 to 25) and the deduction of what might have been a different unidentified period of 3 weeks from a different time-slice attributed to events 17 and 28 for electrical work (which spanned weeks 12 to 33).

116. CWS also challenges the award of loss and expense to NHC for a period of 3 weeks. This challenge is based on the argument that there was no evidence linking the 3-week period of delay to the subcontract, for which no extension of time was granted to CWS, with the 3-week period of delay by NHC in completing the main contract.

4.5 The Questions of Law

4.5.1 The questions formulated

117. I propose to consider the questions of law that arise on both parties' appeals together. They overlap and, for convenience and to enable the argument to develop coherently, the questions should be argued as a composite set of questions arising out of this topic.
118. The questions of law that arise are these:
1. Was the 2-week delay caused by 3M to both the subcontract and the main contract a Relevant Event within clause 11.10 of the subcontract and/or clause 25.4 of the main contract?
 2. Was the arbitrator entitled to use "judicious discretion" in the way described in paragraph 4.08 of the award?
 3. In the light of the answers to questions 1 and 2 and the arbitrator's findings of fact, was he entitled to conclude that:
 - (a) CWS would, for the period by which the subcontract was delayed:
 - (1) be awarded an extension of time for weeks 20 and 21 thereof;
 - (2) not be awarded an extension of time for weeks 22 to 24 thereof;
 - (3) would be awarded additional loss and/or expense incurred in weeks 20 and 21 thereof;
 - (4) would not be awarded additional loss and/or expense incurred in weeks 22 to 24 thereof;
 - (b) CWS's 3 weeks delay in completing the subcontract that occurred in weeks 10 to 33 caused NHC 3 weeks delay in weeks 54 to 58;
 - (c) NHC would, for the period between weeks 54 and 58:
 - (1) be awarded additional loss and/or expense incurred in 3 of those weeks;
 - (2) not be awarded additional loss and/or expense in 2 of those weeks?

4.5.2 Explanation of formulation of questions of law

4.5.2.1 Question 1

119. The grounds put forward by NHC start from the arbitrator's finding that 3M was, for all practical purposes, an employer's selected contractor who should be considered as a nominated subcontractor and not a domestic subcontractor. Equally, CWS's response relies on the arbitrator's finding that 3M's selection by the employer made it appropriate that NHC should be granted a two-week extension of the main contract. Thus, the legal basis of these two potential extensions of time needs to be examined as part of the appeal arising out of this topic. This explains the formulation of the Question 1.

4.5.2.2 Question 2

120. The parties have assumed that the arbitrator has used his discretion outside the framework of the contractual conditions in limiting CWS's financial recovery to 19 of the 24 weeks' delay period. This assumption is not necessarily justified since the language of the contractual provisions, particularly clauses 11.3.2 and 11.7, refers to the use of fairness and reasonableness in the fixing of an appropriate extension of time. That power may well be what the arbitrator was referring to when referring to the use of his discretion. Additionally, the arbitrator may have been referring to the assessment process inherent in the operation of the extension of time and valuation of loss and expense provisions of the contract. However, if, on analysis, the arbitrator was referring to some overriding discretionary process, equivalent to acting "ex aequo et bono", the question of law that arises is whether he had such a power. Thus, the grounds raised in relation to this issue are two-fold. The first is an enquiry as to the process actually engaged in by the arbitrator in using his discretion. The second is an enquiry as to the contractual justification for whatever process he undertook. These two questions are covered by my formulation of question 2 and by the parties' grounds relating to this issue.

4.5.2.3 Question 3

121. This question embraces all the remaining grounds concerned with the award of extensions of time and the decisions not to award any loss. It is worth making express reference to two of the questions raised by Question 3:
1. Question (b). This question is concerned with the question as to whether there was any link between CWS's delay in completing the subcontract, a delay caused by events that occurred in weeks 10 to 33, and NHC's delay in completing the main contract, a delay that occurred in weeks 54 to 58.
 2. question (c)(2). This question is concerned with the question as to whether NHC's loss incurred during the 2-week period of delay in completing the main contract caused by 3M was irrecoverable from CWS, given the arbitrator's findings of fact.
122. The questions raised by Question 3 may not be susceptible to appeals at all since they raise, or potentially, raise the related problems of whether questions of mixed law and fact and questions of whether there was any evidence to support findings of fact can be raised as questions of law under section 1 of the 1979 Act at all. These problems and, if appropriate, the questions themselves, will be for determination at the hearing of the appeals. Question 3 also covers ground 4 of NHC's remission application.

4.6 Further Documents

123. For the hearing of the remission and further reasons applications, the parties did not place before the court all the necessary contractual provisions to enable the position of 3M to be analysed. The main contract conditions are

needed in full, so as to see the nominated subcontractor, assignment and provisions relating to 3M's employment. The relevant extracts from the specification, schedules of rates and drawings are potentially relevant as are any architect's instructions whose effect was to approve or direct the use of 3M. Equally, the equivalent provisions in CWS's subcontract and any tender documents relating to 3M's work that were incorporated into the subcontract are also potentially relevant. These documents are not incorporated expressly into the award but may be considered by the court on the hearing of the appeal. Both parties are challenging the arbitrator's findings of law that relate to the status of 3M under both the main and subcontracts and these findings presuppose an analysis of these contractual provisions. In my view, they may be taken to be incorporated into the award, given the way in which the arbitrator expressed his conclusions as to their meaning and effect.

4.7 Remission Application - "Nominated Subcontractor"

4.7.1 NHC's submissions

124. NHC submits that the argument that delay by 3M could be characterised as the delay of a nominated subcontractor for the purposes of an extension of time entitlement for NHC under the main contract, and hence as a ground for a 2-week extension under the subcontract, was neither pleaded by, nor argued for by, CWS. The potential argument was not referred to by the arbitrator during the hearing and NHC had no possibility or opportunity to present contrary arguments to the arbitrator. The fact that the arbitrator's approach to the characterisation of 3M's delay had not been raised by either party is shown by the fact that CWS, in its' closing submissions, submitted that there was no evidence that CWS's subcontractors caused delay to the subcontract but did not contend that, even if these subcontractors did cause delay to the subcontract, this was, nonetheless, delay for which CWS was entitled to an extension of time for. Had the argument been in play that 3M was, in effect, nominated under the provisions of the main contract, CWS would undoubtedly have alluded to that alternative basis for a grant of an extension of time in its' closing submissions.
125. In support of its' conclusions that there had been procedural irregularity, NHC relies on the decision of HH Judge Lloyd Q.C. in *Strachan & Henshaw Ltd. v. Stein Industrie (UK) Ltd.* This decision followed that of the Court of Appeal in *The "Vimeira"*. Both decisions were to the effect that a particular issue in each case had been determinative of the dispute which had not been pleaded or raised in argument by either party. In those circumstances, it was held, in both cases, that the appropriate course was a remission of the award to the arbitral tribunal for further consideration.

4.7.2 CWS's submissions

126. CWS submits that NHC has erroneously analysed the arbitrator's award and its' supporting reasons. The arbitrator did not find that 3M was a nominated subcontractor. His finding was that the delay caused to NHC under the main contract was delay for which NHC should have obtained an extension of time under the main contract, since NHC had been selected by the employer and NHC could neither change the arrangement that 3M should be employed nor could it control 3M. It is worth drawing attention to the fact that this argument does not identify the specific provision of clause 25 of the main contract under which NHC should have been granted an extension of time, the argument merely asserts that such an extension should have been granted to NHC. CWS's argument continues that NHC was properly unable to obtain any damages for this 2-week period since any loss could not be attributed to CWS's failure to complete the work. Instead, the 2-week delay in completing the main contract by NHC had been caused by its' own contractual performance in carrying out the main contract work within the extended main contract period of working.
127. CWS does not appear to challenge NHC's contention that the arbitrator's method of analysing the delays caused by 3M, and the entitlement of NHC to an extension of time under the main contract, were not the subject of any pleaded case or submission prior to the award being published. CWS's response is, in effect, that, given the findings of fact, the result reached by the arbitrator was correct in law, either by virtue of his reasoning, or by virtue of the reasoning summarised in paragraph 126 above. In those circumstances, and because this part of the award is to be the subject of an appeal by CWS anyway, there is no need for a remission which would be both inappropriate and unnecessary.

4.7.3 "Nominated subcontractor" - conclusion

128. It is clear that the argument that 3M was to be treated for some purposes as if it was a nominated subcontractor under either or both contracts had not been considered at the hearing and formed no part of either parties' respective cases at the hearing. However, that does not conclude the application in NHC's favour. The real question is whether the course the arbitrator took leaves NHC with an actual or potential injustice. I have spelt out in detail the questions of law that arise for determination on the appeals to be argued on a later occasion. These include the twin questions that were not notified to NHC as arising that concerned 3M's status. Since remission is sought so as to allow the same questions of law to be argued and since it is not contended that any further evidence is needed to enable the status of 3M to be considered, I believe that no unfairness is done to NHC if the questions of law already decided by the arbitrator dealt with on the appeals and are not re-argued before the arbitrator with the prospect of a further appeal thereafter. Since so many other questions of law are to be argued in any event, time, trouble and expense will all be saved if the issue is determined once and for all at the forthcoming appeal hearing. The position is quite different from that in both *The "Vimeira"* and *Strachan & Henshaw Ltd v. Stein Industrie (UK) Ltd.* since the issue of 3M's status is not determinative of more than a small part of the award and is one that raises a pure question of law in circumstances in which many questions of law are to be the subject of a court hearing in any case. Such procedural mishap as occurred is fairly capable of being

considered, and any error of law resulting from that mishap can then be rectified, at the forthcoming hearing of the appeals.

4.8 Remission Hearing - Use Of Discretion

129. I have dealt with this ground of complaint at length when considering what questions of law arise and whether further reasons should be ordered. NHC contends that the subcontract does not allow the arbitrator to use his discretion. In considering this application for a remission, it is necessary to keep in mind that there are provisions in the subcontract which may be relevant to the arbitrator's determinations which are being impugned which appear to allow him a wide discretion. In any case, the language used by the arbitrator may go no further than a description of the process that is required of him in fixing, under the terms of the subcontract, both the periods of extension of time to be granted and the money to be paid. If, on analysis, the arbitrator has gone further and has exercised an extra-contractual discretion, the question of whether the terms of the arbitration clause, any express or implied procedural rules governing the reference and any express or implied terms of reference allow him to take that course are all questions of law which are susceptible to an appeal and, in this case, are actually the subject of an appeal. If the arbitrator had no power to "use his discretion judiciously" (and not, it is to be noted "judicially"), his erroneous basis for the relevant determinations can be corrected on the hearing of the appeals. There is, therefore, no basis for a remission.

4.9 Remission Application - Disregard of TSP

4.9.1 NHC's contentions

130. It is submitted by NHC that the arbitrator completely ignored its' case that some of the critical delay in completing the subcontract was caused TSP, one of CWS's domestic subcontractors, who supplied the perimeter heating. In oral evidence, one of CWS's witnesses admitted that the perimeter heating work was "a shambles". NHC's case was summarised in its' closing submissions as follows: "... There was graphic evidence of the failure of TSP. There is clear documentary evidence with contemporaneous complaint by [CWS] about delay being caused by the failure of TSP to supply the equipment timeously. ... On 2nd August 1993, the equipment is said to be required by 4th August. Shortly afterwards, TSP ceased trading and the items which were required by 4th August did not arrive in some cases until late September and the perimeter heating was not completed until 10th January 1994."

131. NHC relies on the decision of HH Judge Lloyd Q.C. in *Miller Civil Engineering Ltd. v. NRA (Yorkshire Region)*. In that case, Judge Lloyd stated: "Those principles permit remission where the subject-matter of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and where it would be inequitable to allow an award to take effect without some further consideration by the arbitrator."

NHC contends that the arbitrator overlooked the argument about TSP's role and that, in consequence, there has been a mishap. NHC concludes that this mishap should lead to a remission to enable the arbitrator to give consideration to the argument that TSP has caused some of the critical delay for which he awarded CWS an extension of time.

4.9.2 Arbitrator's findings

132. The arbitrator considered that some of the delay by CWS in completing its work was caused by its own subcontractors. In paragraph 4.07 of the award, four such subcontractors were referred to and the delay of each in performing its' respective sub-subcontract was regarded as contributing to CWS's delayed completion. As the arbitrator put it: "I have carefully considered these matters and I have decided that the delays referred to in paragraph 4.07 caused a total delay to [CWS's] subcontract of three weeks (over and above [NHC's] concurrent delays) and that this delay of three weeks lies at [CWS's] door." (paragraph 4.08)

4.9.3 Conclusion

133. It is true that TSP was not one of the four subcontractors referred to as contributing to this 3-week delay period. However, it cannot be inferred that because the arbitrator did not refer to some alleged causes of CWS's delay relied on by NHC, he ignored them. The arbitrator only referred to the evidence of delays which he found critically delayed CWS. He is not required to refer to all the evidence and arguments he heard, particularly those that he rejected. It is worth quoting from the judgment of Bingham J. in *The "Alaskan Trader"*: "It is, of course clear, that arbitrators, when giving reasons, are not obliged to spell out every single reason for every single conclusion to which they come and are not obliged to deal in extenso with every contention advanced by advocates for the parties but it is necessary that the basis of important conclusions should be clear."

134. The arbitrator was aware that many factors caused and contributed to CWS's delay and concluded that, overall, the critical delaying factors for all but three weeks were those for which NHC was responsible. In order to get this particular challenge on its' feet, NHC would have to show that the arbitrator had clearly overlooked material evidence, rather than merely not referring to it in his award, and that that evidence might have made a material difference to his award. One potentially defaulting subcontractor cannot be shown to have the potential for altering the arbitrator's overall finding that the predominant cause of CWS's delay, for 21 weeks of the period in question, was NHC. Overall, this award's reasoning more than amply complies with Bingham J.'s guidance in *The "Alaskan Trader"*, and cannot be shown to have ignored, rather than to have rejected without express reference, the argument that TSP contributed to CWS's delay in a way which was the substantial cause of part of CWS's delay. Finally, the evidence, even if ignored, cannot be shown to have had the potential for substantially affecting the award. This ground for seeking a remission therefore fails. The situation is quite different from that considered by Judge Lloyd Q.C. in *Miller Civil Engineering Ltd. v. National Rivers Authority*. Unlike that case, it has

not been shown that the point has been overlooked or that it is potentially determinative of a critical issue. Moreover, it would not be inequitable to allow the award to stand without a reconsideration of this point.

4.10 Remission Application - Inconsistent Findings

135. I have already set out the allegedly inconsistent findings in paragraph 102 above. NHC queried these allegedly inconsistent findings in a letter to the arbitrator dated 20th June 1997, sent after receiving the award and its' reasons. The arbitrator replied, confirming his award, with the following supplementary reasons: *"These assessments involve a certain amount of "give and take" and also allow for the fact that some of [CWS's] own delays (and the time slices referred to) overlap with delays caused by the [NHC]. I do not consider any change should be made to my award because of these comments by [NHC]."*
136. NHC contends that a process of assessment of the overall period of delay using an element of "give and take" is to act outside the limits of the assessment process involved in granting extensions of time provided for by the subcontract conditions and is to act in excess of jurisdiction. Furthermore, an award which is, when analysed, subject to internal inconsistencies, is one which is capable of being remitted.
137. I have already dealt with the contract conditions which govern the grant of extension of time. The appropriate clause is that concerned with the final review of extensions of time after the Works have been completed. It is important to bear in mind that the subcontract conditions provide for a two-stage procedure. During the work, NHC, "whenever it becomes reasonably apparent that the commencement, progress or completion of the subcontract Works is being delayed" was to give an extension of time to CWS. This first stage is one which considers each delaying event separately as near to its' occurrence as possible. Then, no later than 16 weeks from the date of practical completion, NHC was obliged to undertake the second stage of the process. This involved a retrospective review of the whole contract period and a consideration of all delaying events in the round. The clause governing this process provides: *"[that the contractor should] fix such periods or periods for completion of the subcontract Works longer than that previously fixed ... as the contractor PROPERLY CONSIDERS TO BE FAIR AND REASONABLE having regard to any of the matters referred to in clause 11.3.1 whether upon REVIEWING a previous decision or otherwise and whether or not the matters referred to in clause 11.3.1 have been specifically notified by the subcontractor under clause 11.2."*
138. A similar provision allows a downward revision of any previously granted extension. It is this second-stage review that led the arbitrator to fix 21 weeks as the appropriate overall extension of time. As to the different period of 19 weeks for which loss and expense was awarded, it is inherent in the different processes of assessing the length of an extension of time and the length of time for which loss is to be awarded that the two periods will not always coincide or be of the same length. This is particularly so when the assessment process is as fluid as that provided for in clause 11.3.
139. It cannot be said that an element of give and take is precluded by a contractual assessment process which is to be fair and reasonable. At all events, it is not procedurally improper to adopt that method and, at worst, it is to make an error of law which is reviewable, if it be an error, by way of an appeal of a question of law. Moreover, it is to misuse the concept of excess of jurisdiction to characterise a mistaken method of valuing a claim clearly within the arbitrator's jurisdiction as an excess of jurisdiction. Any error of that kind is one that is internal to the decision-making process which, if it is capable of being corrected at all, is only amenable to correction by an appeal of a question of law.
140. I reject the suggestion that the award contains internal inconsistencies. However, any such potential inconsistency has been clarified and corrected in the arbitrator's further reasons provided at the request of NHC in reply to its' letter requesting these dated 20th June 1997. It is clear that an award is susceptible to being remitted if, on analysis, it contains internal inconsistencies, particularly if part of the relief awarded appears to be inconsistent with another part of the award. This is clear from *Atkinson v. WSFS Ltd*. However, for the reasons I have now developed, this award does not appear to be subject to any inconsistency, given the terms of the extension of time machinery contained in the contract.

4.11 Further Reasons Sought

141. Although 6 applications were set out in the originating motion, NHS prudently did not pursue these at the hearing. Thus, no further reasons are sought.

5. Liquidated damages

5.1 NHC's Grounds For Appeal

142. The principal head of loss claimed by NHC in its' counterclaim was for liquidated damages it had had to pay, by way of deductions by the employer, for the period of delay caused by CWS. The arbitrator found that all the sums deducted on account of liquidated damages during the contract, totalling £367,964.02, had been returned to NHC as part of the commercial deal compromising the main contract. This finding was set out in the award as follows: *"While I accept Mr. Ryan's evidence that the sum of £367,964.02 HAD been deducted by the employer, it seems clear from the evidence that this money was returned to [NHC] as part of the commercial deal which culminated in the payment to [NHC] by the employer of £860,000 on 6th December 1996."* (paragraph 13.02)
143. NHC's grounds of appeal are to the effect that there was no evidence whatsoever which would justify such a conclusion and the arbitrator erred in law in so holding. NHC also raises, as a ground of appeal, the contention that the arbitrator should have been aware that liquidated damages could not have been repaid because they are not subject to VAT whereas the sum paid by the employer to NHC was paid with VAT added to it.

5.2 Question of Law

144. No question of law is raised by these grounds of appeal. The arbitrator's finding of fact, and its source, could not be more clearly expressed. He has concluded that it is a reasonable inference from the evidence he heard from Mr. Ryan that the "commercial deal" was a composite one, involving both the payment of money and the repayment, within that sum, of the liquidated damages previously paid. That is a conclusion of fact which is exclusively within the province of the arbitrator. It cannot be said that there was no evidence for that finding. On the basis of the arbitrator's findings, there clearly was evidence of the terms of the compromise. Thus, there was evidence which may or may not have been correctly interpreted by the arbitrator. That is not a question which can be explored by a judge on appeal from the award.

5.3 Further Reasons

145. The further reasons sought by NHC are as follows:

"54. *The reasons for the finding in paragraph 13.02(3) that the sums deducted by the employer in respect of liquidated and ascertained damages were returned to NHC as part of the commercial deal culminating in payment to NHC by the employer of £860,000 on 6th December 1996.*"

5.4 Rejection Of Application

146. The arbitrator has already provided the answer to the question posed by this application, when he stated that he had made the finding that he did because of the contents of Mr. Ryan's evidence and because of the reasonable inferences he was able to make from it. In truth, NHC wishes to interrogate the arbitrator as to what particular passages of the evidence he relied on and as to what his thought-process was that led him to draw the conclusion he did from that evidence. This is an impermissible application since it is seeking further factual background to the findings of fact which are impugned so as to further NHC's argument concerned with the question of fact I have already identified. The application is rejected.

Part D. QUANTIFICATION OF LOSS AND EXPENSE

6. Global Claims

6.1 The Arbitrator's Findings

147. This topic is concerned with the award to CWS of loss and expense. The award is said by NHC to have been made on "a global basis" which is an allegedly impermissible basis for assessing and awarding a subcontractor loss representing the cost resulting from disrupted working conditions where the contractor has caused the disruption in question.

148. The arbitrator set out his general approach to the assessment of loss and expense in some detail. This approach may be summarised as follows:

1. The period of working, which was 57 weeks in duration, was divided up into periods or time-slices which directly related to the period during which a particular event occurred which caused delay and disruption. There were many such time-slices, most of which overlapped with several others.
2. This method of identifying the disruption that occurred was adopted by Mr. Evans and he was correct to adopt this method. The arbitrator also accepted a number of the principles adopted by Mr. Evans in his calculation of disruption costs. However, Mr. Evans' figures were considerably reduced in the light of the evidence given about these figures by Mr. Pickavance.
3. The arbitrator has also made appropriate allowances in his figures for shortfalls in CWS's tender where the tender priced, or made allowance for, too few hours.
4. The figures allowed for disturbance in the award were as follows:

Mechanical Disruption

Disruptive event 9: £6,815.00
Disruptive event 13: £3,305.30
Disruptive event 17: £7,694.40
Disruptive event 26(i) £2,136.00
Disruptive event 26(ii) £784.00
Disruptive event 26(iii) £1,348.00

Electrical Disruption

Disruptive events 9 & 15: £7,906.00
Disruptive event 13: £7,704.21
Disruptive events 17 & 28 £11,224.61
Disruptive events 73, 76, 79, 109 & 110: £6,505.51
Disruptive events 81a, 86, 87 & 117: £3,539.24

149. The arbitrator also explained the difficulties he was faced with in assessing and making an award for this loss as follows: *"I am satisfied that, without any doubt, both the mechanical and the electrical works WERE disrupted. It could hardly have been otherwise in circumstances where a 34-week contract was delayed by 24 weeks. ... The difficulty is, of course, in deciding the amount and value of disruption that CWS has suffered. In a perfect world, disruption could be calculated by the examination of each, in turn, of the many activities that make up the contract to establish if, or by how much, each one has been disrupted but I consider this to be impracticable in this case. I set out ... my own assessment of the amount that [CWS] is entitled to recover."* (paragraph 8.01)

6.2 NHC's Grounds Of Appeal

150. NWH contends that, on the facts as found by the arbitrator, he erred in law in awarding any sum for prolongation or disruption since, on the facts as found, it was clear that CWS had not established any entitlement to recover any loss and expense at all.
151. I have not set out the specific findings with respect to delay. Suffice it to say that, for the relevant events which he found had caused delay, he assessed sums, which were set out as lump sums, for staff costs and supervision costs. He also assessed sums, on a weekly rate basis, for plant but this is dealt with as a separate topic.
152. NWH's complaint is that it had argued at the hearing that the evidence and approach of CWS and its' expert Mr. Evans, with the supporting factual foundation evidence, constituted the presentation of a "global claim". This was an approach which CWS was not entitled to adopt since it was one which did not link specific loss to specific delaying and disruptive events. It was an essential part of this submission that the manner in which CWS had calculated its claimed loss failed to establish any nexus between the relevant events and the money claimed. This contention was supported by a reference to the decision in *Mid-Glamorgan County Council v. J. Devonald Williams & Partner (a firm)*.
153. This decision is one of several which identify the need for a delay or disruption claim to identify the factual link between causative events and the loss claimed. It is noteworthy that this passage occurs in the Recorder's judgment: *"Where, however, a claim is made for extra costs incurred through delay as a result of various events whose consequences have a complex interaction that renders specific relation between event and time and money consequences impossible or impracticable, it is permissible to maintain a composite claim."* (emphasis added)

This passage appears in one of the authorities relied on by NHC at the hearing before the arbitrator and it must follow that no complaint can reasonably be made if the arbitrator, on analysis, sought to follow it, and, in doing so, he made the appropriate factual findings that the "specific relation" needed to be established could not, or could not readily, be established.

6.3 Question Of Law

154. The question of law which appears to arise in the light of these factors is a composite one:
1. Did the facts found by the arbitrator establish a causal nexus between the delaying or disruptive events and the loss awarded?
 2. If the answer to question 1, in relation to any relevant loss awarded, is no, may the loss awarded, in the light of the facts found, nonetheless be recovered?

6.4 Questions of Law Explained.

155. The questions I have set out identify the two issues that NHC's grounds refer to, albeit that it is only possible to ascertain that by reference to the argument presented at the hearing of the application for further reasons. These two issues may be summarised as follows:
1. Why did the arbitrator reject NHC's argument that CWS's claim did not link specific causes of loss with the actual loss suffered; and
 2. Why did the arbitrator find that, in any case, such proof was impracticable?
156. In answer to this part of the appeal, CWS takes a preliminary objection, namely that the claims put forward and made the subject of the various awards are not global claims which have been found to relate to specific causative events. Thus, no questions of the kind put forward by NHC, whether they be ones of fact or law, actually arise at all. Moreover, such relevance as the questions have arise from their being questions of fact. These threshold arguments should, CWS contends, be borne in mind as further reasons for not contemplating ordering further reasons under this topic.

6.5 Further Reasons Sought

157. NHC seeks a plethora of further reasons, namely:
- "14. The reasons for the finding in paragraph 8.01 that the calculation of disruption by means of the examination of each activity to establish how much that has been disrupted is or was impracticable.
 15. The reasons for the finding in paragraph 8.01 that both the mechanical and electrical works carried out by CWS were disrupted.
 16. The reasons for the finding in paragraph 8.03 that the principles adopted by Mr. Evans, CWS's expert, are acceptable. The arbitrator will please identify the principles accepted.
 17. The reasons for the finding in this paragraph that the "time-slice" method is logical.
 18. The reasons for the finding in paragraph 8.03 that CWS has identified the disruption. The reasons for the finding in paragraph 8.04 that Mr. Evans has attempted to "compensate for shortfalls."
 38. The reasons for finding in paragraph 9.00 that the "time-slice" principle for the calculation of loss and expense is acceptable."

6.6 Reasons For Rejecting The Application

6.6.1 General Approach

158. The questions which NHC wishes to raise are concerned with evidential questions, namely the extent to which the arbitrator has linked, and could and should link, specific loss to specific causative events. No general question arises as to the appropriateness or validity of awarding loss on a global basis since the arbitrator has not sought to assess CWS's loss on such a basis. The "time-slice" approach is no more, on analysis, than an attempt, held by the arbitrator to have been successful, to link heads of loss to specific periods of delay and disruption caused by specific causes. Thus, the questions raised by NHC and the further reasons sought are, on analysis, directed to the

question of whether sufficient evidence had been advanced to support each finding of loss for delay and disruption. For reasons already developed at length in this judgment, there is little by way of a question of law in such questions and the further reasons sought should all be rejected on the grounds that they are not required to enable questions which are sufficiently questions of law to be argued.

6.6.2 Specific applications

159. **14.** This application is seeking the reasons for a specific finding of fact. This would involve the arbitrator, in order to comply with a direction to supply these reasons, having to set out most of the evidence relevant to the finding and the reasoning for reaching the conclusions already reached. The only use that such additional reasons could be put to would be as part of an attempt to show that the evidence before the arbitrator did not, in fact, support the findings already made. This is not a question of law.
160. **15.** The award already goes into great detail as to why the works were disrupted. In general terms, it was because the works were seriously delayed and each cause of delay is set out. Thus, in conjunction with the other reasons for rejecting the application for further reasons under this topic that I have already developed, this application is rejected.
161. **16.** The principles referred to are set out in Mr. Evans' report and evidence and there is no need for them to be spelt out individually by the arbitrator. The reasons why these principles were accepted by him are not required to enable the court to consider either of the questions of law raised by NHC. These questions are, in effect, directed to the suggestion that the Evans' principles do not, when applied in practice, provide any sufficient nexus between cause and effect. Knowing what the principles are, and why they were adopted by the arbitrator, will not assist in answering this question, even if it is permissible to pose it in the first place.
162. **17.** This is another application seeking the thought-process leading from evidence to conclusion which would require the evidence to be set out in detail. As with the earlier applications of this kind, this is not permissible.
163. **18.** The reason why the arbitrator concluded that CWS had identified the disruption is because he accepted the evidence of Mr. Evans and of the witnesses who gave evidence about the delaying events. The application for the reasons why the arbitrator accepted Mr. Evans' evidence about "compensating for shortfalls" is another request for reasons for accepting evidence adduced before him. Hence, neither limb of this application is permissible.
164. **38.** This application is, in effect, seeking reasons for the finding that there was a nexus between delaying events and the loss caused since the "time-slice" principle was a catch-phrase adopted at the hearing to describe the nexus between cause and effect, as I have already sought to show. Thus, this application does not relate to the questions sought to be raised by NHC and is not, in any case, directed to any question of law.

7. Head Office Overheads

7.1 NHC's Grounds For Remission

165. The award includes sums to cover the loss and additional expenditure incurred by CWS because it had to run its head office and other off-site overheads in the period of overrun without earning anything extra for such expenditure from the remuneration from the subcontract.
166. The arbitrator's process of ascertainment and his method of assessment are attacked on several related grounds as follows:
1. The method adopted utilised his discretion and the application of "rough justice".
 2. The arbitrator adopted the methods of assessment of which complaint is made without warning the parties of his intention to do so and without either of them having an opportunity to develop its case as to the appropriateness of, and the conclusions resulting from, the use of such methods.

7.2 The Arbitrator's Award

7.2.1 The Reasons

167. The award contains a long section devoted to overhead recovery. The arbitrator found that CWS's turnover in its financial year 1993 yielded 15.56% towards its Group Head Office overheads. It was not possible to assess with any precision what proportion of these overheads was increased because of delay to this particular contract. CWS had undoubtedly suffered a loss under this particular head, which was best calculated and awarded by using a formula. The formula the arbitrator used was one he devised himself by adapting a well-known formula often used in assessing claims of this kind which is usually referred to as Emden's formula, after the text-book of that name. The arbitrator's bespoke formula was:

$$\frac{C \times ECP}{OCP} \times 100$$

Where:

C = Contract Sum

ECP = Length of Extension to Contract Period

OH = Overhead Recovery In 1993

OCP = Original Contract Period

168. The arbitrator found that the relevant values to ascribe to these symbols were:

$$C = \text{£}1,147,316.03$$

$$ECP = 24$$

$$OH = 17.56$$

$$OCP = 34$$

169. The explanation for taking 0.2 x OCP was that the arbitrator determined that the appropriate figure to insert into the formula was 20% of the figure representing CWS's weekly recovery for overheads from the original contract sum, or, to put the recovery allowed into the words of the award: "I accept the principle of Emden's formula but only for 19 weeks and at 20% of the amount calculated by Mr. Evans [using Emden's formula]". (paragraph 7.10)
170. The award explains why this formula was adopted. He found that Head Office overheads is a legitimate head of claim and that CWS did incur a loss of recovery of payment to fund Head Office overheads as a result of the bad delay that had occurred. The only realistic way of calculating this loss was by use of a formula, a decision which was fortified by the fact that NHC adopted just such an approach in claiming its' own additional Head Office expenditure incurred during the main contract period of overrun. This was because: "The involvement of [CWS's] senior management and the letters flowing from them indicates that this contract was causing additional time to be spent by senior management. If the contract had not been delayed I do not believe that this additional time would have had to have been spent on this contract and might have spent (probably productively) on other contracts. (It is reasonable to assume that the extra time spent on this contract would have been spent productively on other contracts because, in general, the CSW Group was trading reasonably profitably during a period of intense competition in the Construction Industry)." (paragraph 7.05)
171. The arbitrator also found that CWS's ordinary Head Office overheads (such as rates, lighting, heating and the like) were increased by the delay on this contract. He also found that there was an appreciable under-recovery by CWS for overheads since it recovered its' overheads from a turnover of £3.8 million in the relevant period, having budgeted to recover them from an appreciably smaller turnover of £2 million.
172. NHC urged the arbitrator to adopt, as a method of assessing this head of loss, the method of taking an appropriate small percentage of the overall claim figure assessed for this contract by the arbitrator. This was rejected by the arbitrator, partly because it had not been pleaded. Instead, to give effect to the findings that I have summarised, both favourable and unfavourable to CWS, he adopted a variant of Emden's formula. In doing so, he used the phrases now attacked in this context, which I have underlined: "I must now decide what proportion (if any) of these Group Head Office Costs were increased because of the delay TO THIS PARTICULAR CONTRACT. The problem is in quantifying the loss and this is a difficult decision but I accept [counsel for CWS's] submission that, "just because damages cannot be assessed with certainty, the wrongdoer cannot escape punishment". "Rough justice" is better than no justice at all." (paragraph 7.08)
173. I have already set out the material passage in the award, but, to repeat it: "As I have stated in paragraphs 7.05 and 7.07 above, I am satisfied that [CWS] has suffered a loss and I therefore use my discretion and I accept the principle of the Emden formula but only for 19 weeks and at 20% of the amount calculated by Mr. Evans." (paragraph 7.10)

7.2.2 The Relevant Contract Provisions

174. The relevant contract provisions state that the task of the arbitrator is to ascertain "the agreed amount of any direct loss and/or expense thereby caused to the subcontractor" using the powers given to him by the arbitration clause I have also set out which includes the powers "to direct such valuations as may in his opinion be desirable" and "to ascertain and award any sum which ought to be the subject of any payment to [CWS]".

7.3 The Parties' Submissions

7.3.1 NHC's submissions

175. NHC submits that, in deciding that the basis of remuneration should be determined using rough justice techniques and by the exercise of discretion, the arbitrator was not deciding the dispute in accordance with the contract provisions nor in accordance with the evidence. Furthermore, the parties had no warning that these methods were to be employed. In this respect, the procedural error of the arbitrator was similar to the errors that led to a remission in three cases relied on by NHC: *Fox v. P.G. Wellfair*, *King v. Thomas McKenna* and *The "Messalia"*.

7.3.2 CWS's Submissions

176. CWS submits that the arbitrator followed a clear and proper train of reasoning in concluding that loss had, on a balance of probabilities, been suffered. This loss could not be calculated with precision. These are circumstances which justify the use of a formula-based method of calculating loss. CWS also relied on dicta of HH Judge Lloyd Q.C. in *McAlpine v. Property and Land Contractors* where the judge was dealing with an appeal in a case where loss and expense was awarded for loss of overhead recovery. The parties, in that case, had accepted that a formula method of calculation was acceptable, the dispute was as to whether the findings of the arbitrator, whose award was the subject-matter of the appeal, were sufficient to establish that loss had in fact been established. Judge Lloyd stated: "All [the observations discussed by Judge Lloyd] suppose, either expressly or implicitly, that there may be some loss as a result of the event complained of so that, in the case of delay to the completion of a construction contract, there will be some "under recovery" towards the cost of fixed overheads as a result of the reduced volume of work occasioned by the delay, but this state of affairs must, of course, be established as a matter of fact. ... Put another way, ... the contractor has to show that there were no means of reducing the unrecovered cost of the fixed overheads in the circumstances in which he found himself as a result of the events giving rise to the delay." (emphasis added)

It was CWS's case that the arbitrator had found that the relevant "state of affairs" had been found to exist and that, therefore, a formula approach to assessment was, as in *McAlpine's* case, permissible in law.

7.4 Conclusion - Remission Application

7.4.1 General Observations

177. It is first necessary to consider what process of assessment was employed by the arbitrator and the extent to which this method had been foreshadowed in the evidence and submissions that he had received. The arbitrator accepted that the "time-slice" method of assessment was the appropriate method to adopt. This involved a finding that certain periods of delay were caused by the relevant event or specific cause of delay. He also found that Head Office costs were expended. There had also been an under-recovery of income to pay for Head Office overheads in the relevant financial year. This was because an additional contribution towards general Head Office expenditure in the relevant financial year would have been obtained by CWS, but was not obtained, had its' personnel been able to devote their time to other contracting activities in the relevant over-run periods. The additional expenditure and under-recovery that he found had occurred was a sum which was about 20%, or one-fifth, of that produced by Emden's formula. The formula method of calculation was one adopted by NHC in its' main contract claim and was one sanctioned by reported decisions cited to the arbitrator in argument.
178. It also has to be borne in mind that the contract allows the arbitrator to value the remeasured work using fair rates or by way of recovery of direct loss and expense. The arbitrator stated he was adopting the latter route but he stated that the former route was available to him. Therefore, if his method of assessment can, in fact, be justified by a valuation by way of a fair rate for Head Office overheads, no reasonable basis for a remission would have been made out.

7.4.2 "Rough justice" and "discretion"

179. The method the arbitrator adopted was one which involved a degree of approximation and assessment. This inherent in a formula method of calculation. The precise method of calculation, namely the precise make-up of the formula, which is, in appropriate cases, accepted as being a permissible method of ascertaining direct loss and expense, involves an of the assessment of loss. Moreover, any calculation of a fair rate for overhead recovery is based on the use of discretion. In using the expressions about which exception is taken, I do not see the arbitrator as doing more, in context, than explaining that he is undertaking the type of exercise I have described which is, or arguably is, sanctioned by the contract. The thin nature of the complaint made by NHC is to be seen from this passage of its' written submissions: *"Had the arbitrator been able to say 'I am satisfied on the evidence that the loss that has been proven (sic) is X', then there would have been no misconduct"*.

In context, the arbitrator has done no more than that which NHC accepts would not amount to misconduct.

7.4.3 Lack of notice

180. Since the arbitrator did decide the case in accordance with, or in purported compliance with, the terms of the contract, the complaint made does not arise. In any case, a party can hardly complain of lack of notice when the method adopted was similar to that adopted by the complainant in its' claim made up the line to the employer and when evidence had been given that the formula method of assessment was appropriate. It follows that the cases relied on by NHC are not in point.

7.4.4. Overall conclusion

181. The grounds for seeking a remission are not made out.

7.5 Grounds of Appeal - Both Parties

182. Both parties have put forward grounds of appeal. NHC's grounds may be summarised as follows:
1. The arbitrator accepted that loss had to be proved but his findings in paragraphs 7.05 and 7.07 do not demonstrate that any loss had been suffered.
 2. The arbitrator's findings do not justify the use of a formula-based method of assessment of CWS's loss.
 3. There was no evidence of under-recovery for Head Office overheads and no consideration of the evidence which showed that NHC had recovered elsewhere the under-recovery awarded.
183. CWS's grounds of appeal may be summarised as follows:
The arbitrator made an arbitrary deduction of 80% in CWS's claim for recovery of Head Office overheads.

7.6 Question of Law

184. It is questionable whether any question of law is identified by these grounds. The nearest to such a question is: *"Do the arbitrator's findings of fact justify the use of the formula he devised to calculate recovery of Head Office overheads?"*

This question covers NHC's complaints that there was no evidence of loss to justify the use of a formula and the related complaints of both parties that the actual formula used failed to take account of recovery elsewhere, (NHC's complaint) and provided for an under-recovery from NHC (CWS's complaint).

8. Plant and Ladders

8.1 NHC's Grounds For Remission

185. The complaint of NHC is that the arbitrator completely failed to consider and deal with its' submissions on two issues:
1. The rates to be used for the quantification of the claim for the use of plant should use, and only use, the actual and substantiated capital and depreciation costs which related to the plant actually used by NHC.

2. The claim that was allowed for delays caused to workmen by having to use a ladder to gain access to the upper floors rather than a staircase was not based on, or proved by, any evidence of what actually happened on site.

8.2 The Legal Basis For A Remission

186. If an award fails to deal with an issue which the parties left to him and which had been the subject of argument and evidence, that failure is a ground for a remission. In these two applications, however, NHC's complaint is more limited. NHC complains that, although the two issues were dealt with by the arbitrator, he allegedly failed to consider relevant arguments put forward by NHC; in the first case, one which would have led to a different basis for calculating CWS's claim, in the second case, one which would have led to the rejection of the claim because it was not supported by any evidence. Thus, on analysis, the grounds for remission are, in the first case, a failure to deal with an issue as to the correct basis upon which CWS's remuneration should be calculated and, in the second case, that there was no evidence to support the arbitrator's findings allowing the ladder access claim.

8.3 Plant Costs

8.3.1 The arbitrator's findings

187. These plant costs were incurred in a two-week period of extension caused by an event referred to in the award as "delaying/disruptive event no. 9". Within the sum awarded is this discrete item he found: *"Regarding plant, I consider the figure of £198.00 per week put forward by Mr. Pickavance to be far too low and, on a contract of this size I believe the figure of £920.82 per week to be reasonable. I therefore allow Mr. Evans' figure for plant."* (paragraph 8.04)

It is to be observed that the total sum which is attributed to this complaint is £1,445.64, being the difference between the two experts' figures for the 2 weeks in contention.

8.3.2 The grounds for complaint

188. The basis of this complaint is that the figure accepted by the arbitrator, Mr. Evans' figure, was clearly shown to be calculated on the wrong basis. It was NHC's case at the hearing that the correct basis for calculating the appropriate remuneration for plant used in a period of delay, where the plant was owned by CWS should be the actual capital tied up in by CWS in buying the plant and any depreciation that could be shown to have occurred. This approach was in contrast to one based on a notional hire rate. NHC contended for basis for calculating plant costs was based on the decision of Judge Lloyd Q.C. in *Alfred McAlpine Homes North Limited v. Property and Land Contractors Limited*. The relevant approach where, as here, the relevant contractual provision defining the entitlement to further reimbursement allows recovery of "direct loss and/or expense" (clause 13.1) is, as Judge Lloyd made clear: *"... the actual loss and/or expense and not a notional or hypothetical amount ... Ascertainment on the basis of hire charges might not have been questioned if there had been a finding that [the contractor] would have hired out this plant but there is no such finding ... Similarly if [the contractor] had not owned the plant but had in fact hired it in there might have been little difficulty in principle in using the actual charges incurred by it. Where plant is owned by the contractor which would not have been hired or which was not able to be hired out the ascertainment of loss and expense must not be hypothetical or notional amounts. An ascertainment needs to take account of the substantiated cost of capital and depreciation but will (or may) not include elements which are included in hire rates and which are calculated ..."*
189. The evidence adduced at the hearing of this application was that Mr. Evans had accepted in cross-examination that he had used plant hire rates in putting forward the claim made by CWS for plant used in the periods of delay for which a claim was being maintained. This was drawn to the arbitrator's attention in closing submissions, as was the submission that this basis of claim was inappropriate in the light of the *McAlpine* case to which I have already referred.

8.3.3 The award

190. I have already set out the relevant passage in the award which sets out the basis of the award for plant. The basis of this ascertainment for loss is made clear by the arbitrator, as I read his award. It is that: *"The difficulty is, of course, in deciding the amount and value of the disruption that [CWS] has suffered. In a perfect world, disruption could be calculated by the examination of each, in turn, of the many activities that make up the contract to establish if, or by how much, each has been disrupted but I consider this to be impracticable in this case. I set out below my own assessment of the amount [CWS] is entitled to recover..."* (paragraph 8.01).

This reasoning is to be considered against the general approach to quantification adopted by the arbitrator. This, in summary, was: *"As this sub-contract was subject to remeasurement, it should (in theory) be possible to value the subcontract works - including the costs of any delay and disruptions - by adjusting the unit rates, so that no loss and expense claim would be necessary. In practice this is not feasible and I am satisfied that the proper approach is that adopted by [CWs] in seeking a remeasured figure and also a claim for loss and expense."*(Paragraph 5.01)

191. The arbitrator considered Mr. Pickavance's figure of £198.00 per week and regarded it as far too low. He also considered Mr. Evans' figure. This was arrived at by listing all the plant used in the first 9 weeks of the contract and averaging the cost of hiring this plant on a weekly basis in that period. Some of the plant was actually hired and the hire rate was used. The balance of plant was owned by CWS and, for this plant, the hire rate representing the "market rate" was taken. The arbitrator considered this average weekly rate "to be reasonable" and allowed Mr. Evans' figure for plant for the relevant 2 weeks. The relevant delaying event was the building not being in a condition to accept equipment, which affected weeks 1 - 9 of the contract.

192. Thus, the arbitrator had heard evidence and submissions as to the appropriate plant rate from CWS and from NHC. He found that it was not possible to establish the amount of loss CWS had suffered for the use of its' plant and concluded that it was appropriate to take Mr. Evans' weekly figure as a reasonable substitute for the actual loss, given the impossibility of him arriving at that actual loss by precise calculation. What he was doing was acknowledging that actual loss was the appropriate basis of recovery but was prepared to assess that loss, at a figure which was intended to represent actual loss, where a more precise ascertainment was not possible.

8.3.4 Conclusion

193. It can be seen that, contrary to NHC's submission, the arbitrator did take into account its' submission and sought to give effect to it in the difficult circumstances that he found existed. Whether he was correct in law to take this course may need investigation on the subsequent hearing of the appeal but there is no basis for a remission or for a suggestion of procedural irregularity.

8.4 Ladder Access

8.4.1 The Award

194. CWS's overall claim was based on the additional costs arising from the disruption caused by delay. The arbitrator found that CWS had been delayed 24 weeks in a 34-week contract, of which 19 were "allowable 'with costs'". The delay was analysed by reference to "time slices " or events with the loss caused by the delay and disruption of each time slices being analysed separately in the award. One of these time slices, number 13, represented the failure by NHC to progress sufficiently the north and south staircases and the Aquinas link. This failure occurred between weeks 10 and 36 of the actual working period.
195. The claim was put forward as a claim for recovery, under the payment provisions of the subcontract, for direct loss and expense caused by a relevant event, in this particular instance the one defined in clause 13.1 of the conditions as a default of "the contractor, his servants or agents, or any subcontractor, his servants or agents". Thus, the loss is also capable of being analysed as being that caused by a breach of the subcontract by NHC.
196. As put forward, the particular head of claim in question was alleged to have arisen in this way:
"NHC's programme ... shows north and south staircases being complete by 18.12.1992. CWS could reasonably, therefore, have expected the staircases to be available for use as access to upper and lower floors. They were not available and access was by ladders, the used of which increases the time for moving labour around the site, particularly at break times when it could take the last operatives in the queue 30 minutes to get on or off the site. Whilst a hoist was available for moving materials, it was not available for the sole use of CWS and there were occasions when it would have been more expeditious and efficient to move materials by hand rather than wait for the hoist, but this was not possible using ladders ... (Effect) ... staircase not available to move materials and equipment - moved by way of ladders, requiring additional labour and time."
197. The award found that the staircases were not built as soon as they should have been and that this caused CWS to suffer some delay and disruption and that the appropriate figure to award should be 40% of Mr. Evans' figure which was: "far too high" (paragraph 8.05).

8.4.2 The grounds for complaint

198. The complaint is that NHC's original case at the hearing has not been dealt with or, apparently, taken into account by the arbitrator. At the hearing, NHC argued that this claim was, as it was put in its skeleton at the remission application: *"a nonsense and had been fabricated by a colleague of Mr. Evans ... [who] could offer no explanation as to why there was no evidence of complaint by [CWS] of any of its subcontractors as to restricted ladder access to the upper floors."*

Despite these submissions and alleged lack of evidence, the arbitrator awarded some remuneration for disruption caused by a delay in providing staircase access. This was to ignore completely NHC's case in relation to this head of claim.

8.4.3 Conclusion

199. The complaint of NHC is directed to its' submission that the claim that CWS put forward should be dismissed since there was no evidence of any disruption caused by a lack of staircase access nor of any contemporaneous complaints of the lack of this access. NHC supported this argument by reference to the subcontract conditions which did not provide for exclusive use of a hoist. However, in its closing submissions, NHC referred to the evidence of one of CWS's witnesses to the effect that there was a waiting time at the ladders, of an average working time of 4-5 minutes. The arbitrator concluded that this delaying event caused the staircases to be built later than they should have been and that some general delay and disruption was, in consequence, caused.
200. Thus, the arbitrator did not ignore NHC's argument, he appears to have considered it but, in the light of the evidence he heard, to have rejected it. There clearly was some evidence of disruption of the kind alleged. The arbitrator, indeed, considered it since he reduced the sums claimed for this head to 40% of these sums because Mr. Evans' figure "is far too high". NHC's contractual arguments had no relevance to CWS's claim. Even if CWS was not entitled to unrestricted access to the upper floors, the additional expense of using ladders in a period of delay, which would not have been incurred had there been no delay, is obviously recoverable even if similar expense incurred during the original contract period would not have been recoverable.

201. The award is based on findings of fact, in circumstances in which there was evidence available to support them. Thus, the findings were exclusively within the province of the arbitrator and do not arise from, and are not connected with, any procedural impropriety.

8.5 The Application For Further Reasons

8.5.1 NHC's grounds

202. The arbitrator is alleged to have erred in law in awarding plant hire charges based on what was reasonable rather than on the basis of actual cost.

8.5.2 The question of law

203. The arbitrator's award sets out why he adopted Mr. Evans' figures. It also explains that direct ascertainment of the type of direct loss and expense usually allowable was not possible. Thus, the question of law is not whether the arbitrator erred in law in not using actual depreciation and capital costs as the basis of his award but whether, in the circumstances found by him to exist, he was entitled to calculate direct loss and/or expense, which was not readily ascertainable, by using a reasonable approximation of what would have been the direct loss, had that figure been ascertainable. The question is directed to the method of ascertainment and not to the type of loss, which, in principle, is recoverable as direct loss and expense. The arbitrator had received NHC's submission that the type of direct costs that were recoverable were those of the type found by Judge Lloyd to be the appropriate ones for plant in his judgment in the *McAlpine* case. However, he then accepted, as proof of such costs, a reasonable assessment of them because formal proof of the actual figures was not possible.
204. The question of law is therefore: *"In the circumstances found by the arbitrator to exist in paragraph 8.01 of his award, was it open to him to value direct loss and/or expense resulting from the use of plant in the period of delay of two weeks caused by event 9 by the process of reasonable assessment summarised in paragraph 8.04?"*
205. In describing this as "a question of law", I leave out of account at this stage whether this is a pure question of law or whether it is a mixed question of both law and fact. If, on analysis, at the hearing of the appeal, the question is seen to be a mixed one, I will need to determine whether section 1(2) of the 1979 Act allows me to answer it in this form and, if it does not, whether a question of law can be distilled out of the mixed question. It may even be argued that the question is one of fact alone.

8.4.4 The further reasons sought

206. NHC seeks the following further reasons:

- "21. The reasons for the findings in paragraph 8.04 that the figure of £198.00 per week put forward by Mr. Pickavance for plant is far too low and Mr. Evans' figure for plant at £920.82 per week is recoverable.*
- 22. As to plant generally, the reasons for preferring the figures of Mr. Evans to those of Mr. Pickavance throughout paragraphs 8 and 9.*
- 25. The reasons for the finding implicit in paragraph 8.05 that CWS was contractually entitled to access the upper floors via the staircases. The arbitrator will please identify the time this entitlement arose."*

8.4.5 Jurisdiction to make the order sought

207. **21.** The first part of the request for further reasons, *"the reasons for the finding in paragraph 8.04 ..."*, is a request for a finding of fact. The purpose for seeking the reasons why Mr. Pickavance's figure was too low is the speculative one of hoping that it will emerge from those reasons that the capital depreciation costs could have been ascertained, thereby showing up the arbitrator's factual conclusion that the direct loss attributable to plant was impracticable. Even if further reasons were ordered which threw up this inference, it would not assist NHC since the highest that its challenge could be put would be that the arbitrator's finding of fact, that ascertainment of the direct loss was impracticable, was erroneous. This finding would still not be challengeable.
208. The second part of the request seeks the reasons for preferring Mr. Evans' figures. However, the arbitrator has made it clear that he had to engage in an exercise of approximation. He had two rival figures, which were themselves assessments. It is not necessary to determine the only question that could form the subject of an appeal, which I have already set out, to know why Mr. Evans' approximation was preferable to Mr. Pickavance's figure. The arbitrator regarded both figures as being approximations, he described Mr. Pickavance's figure as being a "figure put forward by Mr. Pickavance [which I consider] to be far too low".
209. Therefore, it is only necessary to know that the arbitrator considered that a precise ascertainment of the direct loss was not possible and that, in consequence, an exercise of approximation was necessary if anything was to be awarded at all. This is already clear from the award. It follows that no further reasons are needed to enable that question to be answered.
210. **22.** This request covers the same ground as the first of the two requests under this topic and, for the same reasons, I reject the request.
211. **25.** This finding does not, as I read the award, arise implicitly at all. The arbitrator's findings are to the effect that had CWS not been delayed, it would not have been caused to be further delayed and also to be disrupted by the lack of staircase access to the upper floors in the period of delay. In other words, part of the delay and disruption that occurred, which would not have occurred had NHC not delayed CWS, was caused by the absence of staircase access in that delayed period. Thus, the sum awarded for the absence of staircase access arises out of the delay and not out of any implicit finding that, in the original contract period, CWS was entitled to staircase

access. It follows that there is no question, let alone a question of law, to which these reasons could be directed even if they were ordered.

8.5 Conclusion - Ladders And Plant

212. All the applications are dismissed. I should also make it clear that, had I accepted that these particular applications for remission or for further reasons succeeded in principle, I would have exercised my discretion to reject them. The sums at stake do not warrant remission or an order for further reasons. In any case, the detail and the number of issues dealt with at the arbitration were such that an occasional mistake might be expected to occur. This is something which, if it does occur, should not necessarily allow the disgruntled party the right to further reasons, unless the potential error substantially effects the overall sum awarded and any appeal would be substantially prejudiced by a lack of full reasons. This approach is similar to the approach adopted to the appeal provisions applicable to appeals to the Court of Appeal from a finding of fact of an official referee. These can only be brought with leave which will not be granted if the subject-matter of the appeal only concerns a few items in a scott schedule. It is, however, a factor favouring the granting of leave to appeal that the subject-matter of the proposed appeal affects a substantial part of the overall sum in dispute. When an application for further reasons arises in connection with a proposed appeal to be heard by an official referee, the official referee is, in effect, acting as a court of appeal from the arbitrator and should adopt a similar approach to that adopted by the Court of Appeal when considering whether or not to grant leave to appeal from the official referee. Hence, further reasons should only be ordered if the potential appeal with which they are concerned can only be satisfactorily argued if further reasons are supplied and the appeal potentially affects a substantial part of the sum that is claimed or awarded.

9 Easter Working

9.1 The Grounds of Appeal

213. This topic is only worth £410. The grounds of appeal focus on the arbitrator's finding that: *"I am satisfied that [CWS] was involved in additional supervision for carrying out work during Easter Week 1993, but there is some doubt as to whether he was ordered to do so by NHC. ... I had seen no hard evidence that [NHC] issued instructions ... I had some doubts as to Mr. Evans' conclusion that instructions were ever issued ... However, having seen [NHC's] claim against the employer, together with the correspondence referred to therein, it is quite obvious that [NHC] had made a claim under this heading against the employer, I use my discretion and I allow this claim in the sum of £410..."* (paragraph 6.01)

214. The only ground of appeal put forward is that the arbitrator erred in awarding this sum because NHC made a similar claim from the employer. However, the arbitrator reached his conclusion that this claim was valid because he found CWS had been ordered to provide supervision during Easter Week, basing that finding on an inference made by him that arose out of the evidence that was provided that showed that an equivalent claim had been made by NHC against the employer. This was evidence adduced at the hearing in this arbitration and the finding gives rise to no discernable question of law.

9.2 Conclusion

215. Subject to any further argument from NHC at the hearing, there is no question of law arising under this topic.

10 CWS's Supervision Costs

10.1 The Arbitrator's Award

216. In the sums awarded for delay and disruption the arbitrator awarded the sums for CWS's costs of supervision given in evidence by Mr. Pickavance, its' own expert. Objection is taken because the figures put forward by NHC's expert were greater than the comparable figures set out in CWS's pleadings.

10.2 NHC's Grounds For Remission

217. The arbitrator had no jurisdiction to award more than the sum claimed. This is a procedural irregularity of the kind which led to a remission in *Henry Boot v. D.F.Mooney*, a decision of HH Judge Lloyd Q.C. In that case, the arbitrator was held to have misconducted the reference in various respects of which only one is material to NHC's argument. This was that some of the sums he awarded had been in dispute, had been referred to him but had subsequently been compromised by the parties at a lower figure to that included in the award. The irregularity of the arbitrator was to go behind the agreements already reached by the parties since their compromise took these particular disputes outside his jurisdiction. It is worth quoting this passage from Judge Lloyd's judgment: *"It is also clear in the authorities ... that care must be taken not to characterise as an excess of jurisdiction a mistake or error in the exercise of the arbitrator's powers."*

10.3 CWS's Contentions

218. CWS's contentions are succinctly summarised in the skeleton submissions put in for the hearing: *"The arbitrator's jurisdiction is founded in the subcontract which allows him to ascertain sums due. He can accept whatever evidence on a particular point he chooses as long as it is admissible and he acts in accordance with natural justice. In this instance, NHC is complaining because the arbitrator accepted its' expert's evidence in preference to that of CWS's. ... The correct analysis is that if through its' expert NHC makes an admission, CWS is entitled to such award as may be appropriate on that admission."*

10.4 Conclusion

219. The arbitrator has not exceeded his jurisdiction. Firstly, his jurisdiction is taken from the agreement to arbitrate as amended by any subsequent agreement of the parties. The pleadings in the arbitration are not the basis of the

jurisdiction of the arbitrator but merely the documents in which each party gives the other advance notice of the case it intends to place before the arbitrator. Secondly, the parties had not agreed that the evidence of Mr. Pickavance could not be relied on by the arbitrator in relation to this issue. The contrary is the case, since it was advanced without agreement from Mr. Evans and adduced by NHC in relation to this item. It follows that *Henry Boot's* case is irrelevant since, there, the parties had agreed certain items and, once that agreement had been reached, those items were withdrawn from the reference and from the arbitrator's jurisdiction. No such agreement was obtained in this case and the item concerning supervision costs remained for resolution by the arbitrator. I adopt the reasoning of CWS set out in paragraph 218 above with the conclusion that this application for remission is dismissed.

11 NHC's Site Costs

11.1 The Arbitrator's Award

220. This topic is concerned with the counterclaim put forward by NHC. The arbitrator allowed NHC to recover damages based on a period of 3 weeks within the overall period of CWS's delay in completion. The heads of loss allowed by him included a weekly figure for the cost to NHC of running its' site establishment in this period. NHC put forward a figure which worked out at £8,810.40 but this was reduced by the arbitrator to £5,286.24 per week, a reduction to 60% of NHC's figure. The award contains this passage:

"I am aware that [NHC] was still completing sundry work at a late stage of the contract. [NHC] claims that his site running costs were £44,052.97 for the period 13th January to 18th February 1994 - a period of 5 weeks - which equals £8,810.40 per week and I think this figure is reasonable. However, in my judgment, some of [NHC's] other subcontractors were also partly responsible for [NHC's] extra costs during this period.

As [CWS] was responsible for 3 weeks delay, the amount he must pay is:-

3 x £5,286.24 = £15,858.72." (paragraph 13.03)

11.2 NHC's Grounds For Remission

221. NHC put forward two related grounds for a remission:

1. The arbitrator found that NHC's site costs should be reduced to 60% of the proved costs by applying his own experience and not by relying on the parties evidence or arguments.
2. The apportionment made by the arbitrator of the site costs of NHC was made without the parties having had an opportunity to make submissions on the proposed apportionment.

11.3 Conclusion

11.3.1 Apportionment - whether justified or not

222. The application proceeded on the basis that the arbitrator did not have any evidence to support what is described as "an apportionment". However, it is doubtful that it is accurate to describe the exercise carried out by the arbitrator as an apportionment. He had received evidence that the overall site establishment costs in the 5-week period were £44,052.97. He then averaged these out across the period to obtain a weekly figure. He found that the cause of this loss was the responsibility of a number of subcontractors and that the causative potency of CWS for the loss was about 60% of the overall figure. It follows that the arbitrator assessed that the other subcontractors had caused part of the expenditure, namely about 40% of it. Thus, the arbitrator has made three relevant findings of fact:

1. CWS and other subcontractors caused NHC to incur additional site establishment costs.
2. The relative contribution to the delay can be disentangled to the extent that CWS was marginally more responsible than the others put together. The costs it was largely responsible for were about 60% of the total site costs.
3. The costs attributable to CWS can be assessed at a figure of £5,286,24 per week for 3 weeks.

223. These findings are findings of fact. Whether or not they are justified by the evidence adduced, they cannot be challenged in remission proceedings. This application fails.

11.3.2 No opportunity to make submissions

234. The parties put before the arbitrator evidence of the total loss incurred by NHC in the relevant period and a breakdown of that loss. The arbitrator had the power to make assessments based on the evidence placed before him and was not confined to a mere acceptance or rejection of the evidence placed before him. Thus, the parties had every opportunity to make submissions on the appropriate amount to be awarded for each week of delay for which CWS was to pay damages. These submissions could have been anticipated to have been required to address two alternative bases of award in favour of NHC. The first was on the basis that the sum put forward by NHC was accepted in full. The alternative basis was that the sum to be awarded should be reduced from that which had been claimed. It follows that the situation complained about is not comparable to those in the cases relied on by NHC, namely *King v. Thomas McKenna Ltd* and *The "Messalia"*. This application also fails.

11.4 The Parties Grounds Of Appeal

225. Both parties have put forward grounds of appeal. Those put forward by NHC are, in summary:

1. NHC should have been awarded a fair and reasonable sum for its' site costs. That was the full sum proved to have been incurred by it during the relevant period.
2. If NHC was entitled to recover 60% of its' site costs, it must follow that CWS caused the relevant period of delay which, in turn, should have led to a finding that NHC should recover 100% of its' costs.

226. CWS's grounds of appeal may be summarised as follows:
1. The arbitrator made no finding as to NHC's costs incurred during the period of delay in the relevant period when CWS was in delay.
 2. The finding that CWS should pay 60% of NHC's site costs was made without evidence attributing these to any act or omission by CWS.

11.5 Questions of Law

227. The only question that these various grounds throw up is: "Do the findings of fact support the conclusion that NHC should recover site establishment costs of £15,858.72?"

This, like several other questions posed by the parties' appeals, does not appear to give rise to a question of law.

Part E RETENTION AND DISCOUNT

12. Retention

12.1 The Arbitrator's Findings

228. The award made a finding as to the total value of the remeasured work. The sum to be paid by NHC was net of all sums already paid by NHC to CWS. Thus, no sum was deducted for retention. The subcontract makes provision for retention, the second portion of which becomes due and payable by NHC to CWS within 7 days of the receipt by NHC of the second moiety of retention payable under the main contract. The award makes this finding: "I understand that the main contract retention was released in August 1996 but this money does not appear to have been passed on to [CWS]." (paragraph 15.10)

12.2 NHC's Grounds For Remission

229. NHC contends that there was no claim for the second moiety of retention in the arbitration since the arbitrator was appointed on 22nd June 1995 and, on that date, nothing was due by way of the payment of this portion of retention which only became due, and hence claimable, for the first time in August 1996. NHC relies on the "clear law" established by *Eshelby v. Federated European Bank* in support of its contention that this is a jurisdictional error, which is, in consequence, misconduct. This ground is probably the only one which is not capable of being advanced both as a remission application and as a misconduct application.

12.3 CWS's contentions

230. CWS contends that NHC has misconstrued the applicable subcontract conditions. Retention does not, as NHC puts it, "fall due", the conditions merely allow the contractor to hold back money which is already due in certain circumstances defined by the subcontract conditions. If NHC contended that retention could and should be withheld, it was for it to prove its entitlement to withhold retention and it failed to do so. Furthermore, the dispute the arbitrator had to decide was as to the value of the Final Account on the day of the award and, in the light of that and any payments made up to the date of the award, to award the net balance due to CWS.

12.4 Conclusion

231. NHC's application is based on a misstatement of the arbitrator's jurisdiction. To contend that no sum falling due after his appointment falls within his jurisdiction is to contend that the arbitrator's task is to fix the value of CWS's entitlement as at the date of his appointment. To see the illogicality of this, one need only ask the rhetorical question: "in that case, what about sums paid after the arbitrator's appointment, must those be ignored in determining the net sum due to CWS?" If the answer is no, by parity of reasoning, why should retention "falling due" after that date be ignored?
232. However, I adopt the two grounds put forward by CWS in opposition to this application. It is clear from the arbitration reference that the arbitrator is to determine the value of the Final Account as at the date of the award. If anything is to be withheld from that, it is for NHC to plead and prove such an entitlement and that it did not do, no doubt because it had no continuing entitlement to withhold the second moiety of retention. It follows that *Eshelby's* case is not in point. There, a second instalment of payment for alterations to a night club in Soho fell due after the writ had been issued and it was held that a claim for that instalment could not be included in the proceedings. However, in this arbitration, the powers of the arbitrator are, or are arguably, such that he is to determine the Final Contract sum, irrespective of whether any part of it was or was not due at the time of his appointment. Thus, the cut-off point for the determination of his jurisdiction was not the date of appointment. This application fails.

12.5 NHC's Grounds Of Appeal

233. NHC is pursuing an identical attack on the award of the second instalment of retention by way of appeal as it does by way of an application to set aside the award. Thus, the question of law that is posed is: "Does the fact that the arbitrator was appointed before NHC received payment from the employer of payment of the second part of the retention under the main contract preclude an award for the second part of the retention that had been retained under the subcontract?"

13. Discount

13.1 NHC's Grounds Of Appeal

234. The grounds of appeal put forward by NHC are, in summary:
1. The arbitrator has construed the conditions of subcontract erroneously in finding that NHC was only entitled to the first of two discounts provided for in the conditions if it had made timeous payments to CWS. In other words, the first discount was erroneously held to be time-dependent.
 2. There was no evidence that NHC had made late payments to CWS.

3. The arbitrator has construed the conditions of subcontract erroneously in finding that NHC was not entitled to the second discount provided for. The only ground put forward by the arbitrator in paragraph 14.02 of his award in support of this finding did not justify his refusal to award this second discount in NHC's favour. These were that this discount was not in the parties' minds when they signed the subcontract and that NHC never enforced it.

13.2 Questions of Law

234. The following questions of law arise:

1. Is the taking of discount by NHC dependent on timeous payment of sums due to CWS?
2. Do the findings of fact disentitle NHC to the second discount?
3. Was there any evidence to support the findings in paragraph 14.02 of the award?

13.3 Application For Further Reasons

235. There is one application for further reasons:

"69. The reasons for the finding in paragraph 15.10 that in relation to the first discount, NHC's entitlement to the same was governed by payment on time."

13.4 Reasons For Rejecting The Application

236. **69.** The application is seeking the reasoning that led to a finding of fact. Moreover, the question of law sought to be raised by NHC is as to whether it is a permissible basis for not being able to take advantage of the first discount that payments were not made timeously to CWS. This involves a construction of the discount provisions of the subcontract and this exercise is answering a question of law thrown up by the construction of the conditions. In answering this question, it is not necessary to know whether any particular payment had been made on time or late. If withholding is, in principle, allowed, whether or not the factual conditions existed for withholding in this case is a question of law. The arbitrator's findings are not susceptible any further question of law, other than the question of construction to which I have already referred, nor to further reasons.

PART F. OVERALL CONCLUSIONS

14.1 Conclusions

237. All applications fail and the originating motions claiming remission and/or setting aside and further reasons will be dismissed.

14.2 The Appeals

238. The parties should prepare two bundles of documents. The first should contain all the relevant provisions of the subcontract and the main contract. The second should contain all parts of the award, including paragraphs 1 to 57 which were not included in the award bundle prepared for the hearing of the applications. It should also include all the appendices, including those stated not to form part of the award. The parties should try and agree the precise questions of law to be argued, using my draft in schedule 2 to this judgment as the starting point. If agreement cannot be reached, each party should set out its' version of any question whose wording cannot be agreed in advance of the hearing. Each party should serve a skeleton before the hearing. These should be served sequentially so NHC should serve its' skeleton in time for CWS to serve its skeleton subsequently and so that it can be responsive to NHC's skeleton. The parties should also prepare a bundle of authorities that are to be referred to in the skeletons or at the hearing.

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