IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2010-441-833

UNDER	the Arbitration Act 1996
IN THE MATTER OF	an application for leave to appeal to the High Court under Clauses 5(1)(c) of the Second Schedule of the Act
BETWEEN	MATTHEW BRUCE LAWSON AND BLAIR ROBINSON Plaintiffs
AND	MICHAEL JOHN WENLEY, ALAN JAMES DAVIES, LAWRENCE WILLIAM WILLIS AND RICHARD IAN CROSS Defendants

Hearing: 9 May 2011

Counsel: J O Upton QC for Plaintiffs
M J Wenley for Defendants

Judgment: 24 June 2011 at 2:45 PM

JUDGMENT OF ALLAN J.

This judgment was delivered by
The Hon. Justice Allan
on
24 June 2011 at 2:45pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

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[1] This is an application pursuant to art 5(1) of the Second Schedule to the Arbitration Act 1996 and r 26.15 of the High Court Rules, for leave to appeal on certain questions of law from the award of Mr B J Paterson QC, acting as arbitrator, dated 1 October 2010.

Background

[2] The applicants are former partners in the legal partnership of Willis Toomey Robinson. Mr Lawson retired from the partnership on 31 December 2008, and Mr Robinson on 31 March 2009. Since 1 April 2009, the applicants have practised in partnership under the name Lawson Robinson. On that same date, the remaining partners in Willis Toomey Robinson entered into a partnership with Mr Callinicos, and have continued to practise in partnership with him under the name of the former firm.

[3] All of the parties to this proceeding, together with two other (former) partners, executed a partnership agreement dated 17 August 1999 (the Partnership Agreement). The Partnership Agreement contained provisions setting out the entitlement of an outgoing partner and the obligations of the remaining partners to pay those entitlements.

[4] The amounts owing to Mr Lawson and Mr Robinson respectively are not in dispute. It is agreed that $94,091 is owed to Mr Lawson and $85,877.44 is owed to Mr Robinson. The issues in dispute are as to whether the applicants were entitled to payment of those sums in 2009, or at some later date, and whether the applicants are entitled to interest on their unpaid entitlements. A further issue as to the obligations of the applicants with respect to the excess on an insurance claim against the firm was determined by the arbitrator but is not pursued in this court.

Jurisdiction

[5] Where the parties have made no provision in their arbitration agreement for a right of appeal, there are, as a matter of public policy, strict limitations on the

subsequent involvement of the courts. Finality and certainty are central aims of the arbitral process. Parliament has therefore conferred on the court a limited jurisdiction to review alleged errors of law, but only in clearly defined circumstances. In so doing, Parliament has endeavoured to balance the desirability of finality in arbitral proceedings against the reasonable entitlement of a party to have its disputes determined in accordance with the law. Art 5 of the Second Schedule to the Arbitration Act 1996 reflects that legislative intention. So far as is relevant it reads:

> **Appeals on questions of law**
>
> (1) Notwithstanding anything in articles 5 or 34 of the Schedule 1, any party may appeal to the High Court on any question of law arising out of an award—
>
> (a) If the parties have so agreed before the making of that award; or
>
> (b) With the consent of every other party given after the making of that award; or
>
> (c) With the leave of the High Court.
>
> (2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.
>
> (3) The High Court may grant leave under subclause (1)(c) on such conditions as it sees fit.

[6] Ordinarily, where the Court decides to grant leave, reasons will not be given because it is not desirable that the Judge who is to hear the substantive argument be embarrassed or influenced by the existence of written reasons penned by another Judge: *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd*.[1] This principle is now reflected in r 26.17. If leave is not granted the Judge should deliver a short judgment for the benefit of the parties indicating, where necessary, whether the matter in issue is considered to be one-off, and why the case did not meet the required standard. A detailed analysis of the alleged error of law is not required: *Gold & Resource Developments*[2] – see also r 26.18.

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[1] *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [58].
[2] *Gold & Resource Developments*, above n 1, at [59].

[7] In *Gold & Resource Developments* the Court of Appeal considered, at some length, the jurisdiction conferred on the Court by art 5, and undertook an analysis of recent authorities in England and Australia. The judgment included a detailed consideration of matters which are to be seen as guidelines, rather than as governing the exercise of the discretion.[3]

[8] However, a precondition to the exercise of the Court's discretion is the requirement that the Court considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties. (art 5(2)).[4] Leave will not be granted if, as between the immediate parties, the matter in dispute is largely academic: *Gold & Resource Developments*;[5] *Ipswich Borough Council v Fisons plc*.[6] Once these pre-conditions are satisfied, it will be appropriate to turn to the question of how the Court's discretion ought to be exercised in the light of the guidelines laid down at [54] of *Gold & Resource Developments*.

[9] The guidelines themselves are by now well known and it is necessary to review them only briefly. The first consideration identified by the Court of Appeal as the most important is the strength of the argument that there has been an error of law, and the nature of that point. If it is a one-off point, in the sense it is unlikely to recur, and cannot be seen as having any precedent value either generally or to the parties on another occasion, then unless there are very strong indications of error, leave should rarely be given: *Gold & Resource Developments*.[7] But where the point could properly be regarded as having precedent value, either generally or to the parties, then it will be sufficient for an applicant for leave simply to show that the point is strongly arguable.

[10] The remaining guidelines, not listed in any particular order, are:

(a) Whether the question of law arose incidentally, or whether it was the very point of the arbitration. In the latter case, it will be more difficult

[3] Ibid, at [54].
[4] See [5] above.
[5] *Gold & Resource Developments,* above n 1, at [11].
[6] *Ipswich Borough Council v Fisons plc* (1990) Ch 709, 721.
[7] *Gold & Resource Developments,* above n 1, at [54].

to obtain leave to appeal, but leave will be more readily granted where the legal issue concerned emerged during the course of the arbitration, rather than being in question from the outset.

(b) Whether the arbitrator is legally qualified. If he is it will be more difficult to obtain leave to appeal on a question of law.

(c) Whether the dispute has great significance to the parties. In that context it is proper to take into account more than simply financial issues.

(d) Whether a substantial amount is at stake. Where it is, leave will be more easily obtained.

(e) The effect of delay. Where there will be significant delay as a result of resorting to the Court, and the amount of money involved is not substantial, then the prejudice to the parties arising from the delay might outweigh other considerations.

(f) Whether the contract provides for the arbitral award to be final and binding. Where there is such a clause that will not be determinative but it will be an important consideration.

The Partnership Agreement

[11] The agreement that governs the dispute is relatively short. Those clauses which are of particular application for present purposes are:

> **12** **GENERAL ENTITLEMENTS ON TERMINATION OF PARTNERSHIP INTEREST** -
>
> (a) In the event of permanent disability (including permanent disability due to sickness or illness) resulting in the retirement of the Partner from the partnership there shall be paid to the Partner for the first thirteen (13) weeks of disability his entitlement to his full share in the partnership profits.

(b) On the death or retirement of a Partner full and complete accounts of the partnership business shall be taken as at the date of death or retirement of the Partner as the case may be.

(c) The share of the deceased or the retired Partner shall be calculated as follows and the retired Partner or the administrators of the estate of the deceased Partner shall be entitled to the sum of the following:

(i) Repayment of the capital of that Partner in the capital of the partnership as at the date of death or retirement but excluding capital transferred to a retirement fund or alternatively if the capital of that Partner shall be in debit then that debit will be reimbursed by that Partner or deducted from any moneys that would otherwise be payable to him hereunder;

(ii) The amount (if any) lying to the credit of that Partner in his current account as at the date of death or retirement or alternatively by deducting from the share the amount by which the current account of the Partner is in debit if such be the case;

(iii) The Partner's share in the proceeds of the policies of the life of that Partner referred to in sub-paragraph 14(a) hereafter set out or in any policies in substitution or in addition thereto.

(iv) That Partner's share of the moneys comprising any retirement fund which is the property of the firm.

SPECIFIC ENTITLEMENTS

13 **UPON** the death or retirement of a partner after ten (10) years' service as a partner, they (or their executors as the case may be) shall also be entitled to and shall be paid by the then remaining Partners that Partner's share of sixty per cent ($60%) of the work in progress of the partnership as at the date of death or retirement and it is hereby agreed that such payment shall be deemed to be payment of income.

...

15 **PAYMENTS** to any Partner, Partners or his or their administrator/s pursuant to clauses 12 and 13 hereof shall be limited to a total amount in any one year not exceeding five (5) per cent of the nett income of the partnership in that year and the payments to the Partners, Partners or estates involved shall be spread accordingly. If the amounts payable in any year are payable to more retiring or deceased Partners' estates than one (1) then the sums involved are to be paid first to the Partner (or his representative) whose retirement is due to death or to age or to ill-health in priority to any Partner who has ceased to be a Partner for any other reason **PROVIDED HOWEVER** that the provisions of this clause shall not apply to the proceeds of any insurance policies paid pursuant to clause 14 hereof.

...

DISPUTES

18. **ALL** disputes which may arise between the Partners or between one of them and the personal representative of the other or between their respective personal representatives touching or concerning the partnership or any matter incidental to it shall be referred to a single arbitrator; to be nominated in case the Partners or their representatives cannot agree by the President for the time being of the Hawke's Bay District Law Society. The arbitrator shall have full power to dissolve the partnership if he thinks fit **AND** this clause shall be deemed "*a submission*" within the meaning of the Arbitration Act 1996. The prime consideration to be applied by the arbitrator should be fairness to all concerned as opposed to the purely legal position which, of course, must be a factor to be taken into account.

Appeal grounds

[12] The applicants advance five separate grounds of challenge to the arbitrator's award. I deal briefly with each of them in turn.

[13] The first point raises a question which the applicants have chosen to separate into two questions of law:

(a) Whether s 47 of the Partnership Act 1908 should be construed so as to require the [respondents] to pay the debts due to the [applicants] by the [respondents] prior to the [respondents] entering into a new partnership?

(b) Is the arbitrator's interpretation of the words in cl 15 of the Partnership Agreement correct?

[14] In para 32 of the award, the learned arbitrator said:

32. It is my view that this is a case where what may be a plain and ordinary meaning of the words in clause 15 must give way to another interpretation. The intent was that, if the firm continued in operation, the cap would apply to the income of that ongoing firm. Objectively, a reasonable person would not consider the meaning of the term "*net income of the partnership*" only applied while the remaining partners were the only partners in the firm. Although technically there were different partnerships involved, the term means, in my view, "*the net income of the successive partnership or*

> *partnerships to the partnership which is dissolved*". In these circumstances, the claimants do not succeed on the first issue.

[15] This argument depends also on the provisions of s 47 of the Partnership Act 1908 which provides:

> **47. Distribution of assets on final settlement of accounts**
>
> In settling accounts between the partners after a dissolution of partnership the following rules shall, subject to any agreement, be observed:
>
> (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:
>
> (b) The assets of the firm, including the sums (if any) contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
>
> (i) In paying the debts and liabilities of the firm to persons who are not partners therein:
>
> (ii) In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
>
> (iii) In paying to each partner rateably what is due from the firm to him in respect of capital:
>
> (iv) The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

[16] It is common ground that the former partnership was dissolved on 31 December 2008 by the retirement of Mr Lawson and Mr Robinson Snr (not a party to this proceeding). It is also common ground that the new partnership was itself dissolved upon the retirement of Mr Blair Robinson (one of the present applicants) on 31 March 2009.

[17] It is agreed on both sides that the learned arbitrator correctly summarised the position at para 21 of his award:

> 21. The law is clear. Until 31 December 2008, there was a partnership in which all parties to this arbitration were partners, as was Mr Robinson Snr. It came to an end on 31 December 2008. A new partnership comprising Mr Robinson and the four respondents came into existence on 1 January 2009. This new partnership terminated with the retirement of Mr Robinson on 31 March 2009.

> Subsequently, another partnership came into existence on 1 April 2009 when the respondents admitted Mr Callinicos.

[18] In summary, the proposed argument for the applicants is:

(a) The arbitrator was not entitled in para 32 to depart from the plain and ordinary meaning of cl 15. At the latest, the applicants' rights were triggered on the termination of the new partnership on 31 March 2009 when Mr Blair Robinson retired.

(b) Section 47 of the Partnership Act 1908 obliged the then partners to pay the debts and liabilities of the firm (including the amounts then owing to the applicants) upon dissolution of the partnership.

(c) Upon the proper construction of the Partnership Agreement, the "partnership" referred to in cl 15 could only have been the partnership which was in existence immediately following the dissolution by the retirement of Mr Lawson.

(d) The effect of the award is to prevent the applicants from becoming entitled (by virtue of s 47 of the Partnership Act) to payment of their debts upon partnership dissolution and to postpone their entitlements indefinitely. An effect of the arbitrator's interpretation of s 47 and cl 15 of the Partnership Agreement is to provide for a partnership with perpetual succession and to impose upon the applicants a contractual relationship with persons legally unrelated to them (because the five per cent cap in cl 15 of the Partnership Agreement relates to the net income of "the partnership" and not merely of the partners with whom the applicants were formerly in partnership).

[19] I consider that a strong argument is available to the applicants in respect of the arbitrator's interpretation of cl 15.

[20] If he is correct, a necessary corollary would be that, even if all of the remaining partners in the former firm eventually retired, the continuing (new)

partners would bear responsibility for payment of the applicants' entitlement, even though none of them was ever a party to the original Partnership Agreement.

[21] The second argument which the applicants wished to pursue, if leave is granted, concerns a discovery application made by the applicants but never finally determined by the arbitrator. The applicants sought discovery of the accounts of the partnership of which the respondents are now partners, for the year ended 31 March 2010. The arbitrator did not rule on the discovery application, reserving his decision for later determination. The applicants contend that the accounts sought would demonstrate that the debts due to them had become debts of the new partnership formed on 1 April 2009. It is said that the production of the accounts would demonstrate that the partnership formed on 1 April 2009 had assumed liability for the debts owing to the applicants. This circumstance is said to be relevant to the applicants' contention that, as a matter of law, the respondents were not at liberty to assign responsibility for the debts to the new partnership. The applicants maintain that as a result of failing to address the discovery issue the arbitrator has erred in law because he has failed to take into account a circumstance (the state of the accounts for the year ended 31 March 2010) that was relevant to the applicants' argument.

[22] The applicants now seek to have this Court determine the following questions:

(a) Whether the arbitrator made an error of law in finding there was no issue relating to the assignment of the debts due by the respondents to the plaintiffs.

(b) Whether the arbitrator made an error in failing to address the issue of discovery, sought by the applicants from the respondents, of the accounts of the partnership of which the applicants are now partners for the year ended 31 March 2010, and other communications between the defendants.

[23] It is difficult to see why the applicants require discovery of the accounts from the new firm. If the accounts made no reference to the debt owed to the applicants,

then they were irrelevant. But, even if the accounts did show the amounts owing to the applicants as a debt of the new partnership, that circumstance could not, in my view, bear upon the construction of the terms of the Partnership Agreement. The interpretation task is to be conducted, first, by considering the language of the agreement itself, and then by considering all the surrounding circumstances. The state of accounts involving other parties, and prepared more than a year after the applicants' retirement, could not be of assistance in determining what cl 15 of the Partnership Agreement meant. At best, entries in the accounts might suggest that Mr Callinicos regarded himself as obliged to make a contribution to payments to the applicants, contrary to the arbitrator's finding at paragraph 34 of the award but that would not assist in determining the central issues in the case. In my view, this second pair of questions does not require an answer separate from that posed by the first pair.[8] Moreover, I doubt whether the arbitrator's decision to make no order in respect of a discovery application could be said to amount to an error of law for present purposes. I do not consider this second category of questions to give rise to an argument sufficiently strong to justify the grant of leave.

[24] The next issue concerns the question whether there has been a final settlement of accounts between the parties. Section 45 of the Partnership Act 1908 provides:

> **45. Right of outgoing partner to share profits made after dissolution**
>
> (1) Where any member of a firm dies or otherwise ceases to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representative, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 percent per annum on the amount of his share of the partnership assets.
>
> (2) Provided that whereby the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner, or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option

[8] Above at [21].

> does not in all material respects comply with the terms thereof he is liable to account under the foregoing provisions of this section.

[25] Paragraph 41 of the arbitration award reads:

> 41. Neither counsel concentrated on the meaning of "*final settlement of accounts*". It is difficult to see that there was not a final settlement of accounts in this case. The amounts due to the claimants were fixed by accounts prepared at the respective dates of dissolution. There is no dispute that "*complete accounts of the partnership business*" were taken at the date of retirement in accordance with clause 12(b) of the partnership agreement. Section 47 of the Act sets out the mechanism for determining those accounts in the absence of any agreement. Because of the final settlement of accounts, s 45(1) does not apply.

[26] The significance of s 45 is that it provides that, until the final settlement of accounts, an outgoing partner is entitled to interest at five per cent per annum on the amount of his share of the partnership assets. The arbitrator found that there was no entitlement to interest because the accounts had been finally settled. The argument for the applicants is that there can be no final settlement of accounts until the liabilities evidenced by the accounts have been discharged by payment.

[27] Again, the applicants seek to pose two questions for determination for the Court:

(a) Whether the arbitrator erred in his interpretation of what was required for there to be a "final settlement of accounts" for the purposes of s 45 of the Partnership Act 1908?

(b) Whether the arbitrator erred in his interpretation of the Partnership Agreement and/or the Partnership Act 1908 in finding that there was no requirement to pay interest on the amounts due pending payment?

[28] In my view, these linked questions do raise a strongly arguable case. It appears that the issue received little attention before the arbitrator and neither counsel referred to any relevant authority at the hearing before me. But the matter is of some significant practical importance not only to the parties but more widely.

[29] The next question is linked with the previous point, namely the question of whether accounts had been settled between the parties. At para 42 of his award the arbitrator said:

> 42. Further, if I am wrong in the conclusion drawn in the previous paragraph, s 45(1) could not apply in this case because there is an "*agreement to the contrary*". The provisions of the partnership agreement contained an agreement contrary to the provisions of s 45(1). The parties agreed on the entitlement of outgoing partners and the manner in which those payments were to be made. Section 45(1) has no application.

[30] There is no reference in the Partnership Agreement to the payment of interest But the agreement specifically incorporates the provisions of the Act. Section 45 envisages that interest will be paid unless there is an agreement to the contrary. The arbitrator did not identify the provisions of the Partnership Agreement which he considered to amount to an agreement to the contrary for the purposes of s 45(1).

[31] The applicants accordingly seek leave to advance the following question:

> Whether the arbitrator erred in his interpretation of the Partnership Agreement and/or the Partnership Act 1908 in finding that the provisions of the Partnership Agreement contained "an agreement to the contrary" which negated the obligation to pay interest in accordance with s 45 of the Partnership Act 1908 on the sums due by the [respondents] to the [applicants]?

[32] Again, I am of the view that the applicants' argument is strongly maintainable if leave is given to appeal.

[33] The final question in respect of which leave is sought is concerned with cl 18 of the Partnership Agreement, the last sentence of which required the arbitrator to act with "... fairness to all concerned as opposed to the purely legal position which, of course, must be a factor to be taken into account".

[34] The arbitrator seems to have discerned an element of unfairness to the applicants in the outcome of the arbitration because, in considering the concluding words of cl 18 of the Partnership Agreement he commented that:[9]

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[9] At para 53 of the Award.

> Equity and justice may suggest that it would be appropriate for the Respondents to suggest an arrangement either to accelerate the payments due and/or pay interest on them after a reasonable time.

But he did not feel able to give effect to the concluding words of cl 18 of the Partnership Agreement by amending the award in any way. The argument for the applicants is that they are likely be out of their money for some years without payment of interest.

[35] Mr Upton points out that the effect of the award is to enable successive retiring partners to be paid out by succeeding iterations of the partnership in priority to the applicants. They wish to argue on appeal that the arbitrator erred in law in his failure to apply the terms of the Partnership Agreement by giving effect to the concluding words of cl 18.

[36] I consider that this question is also at least capable of serious argument at least. Indeed, in my view, it might responsibly be held that the concluding words of cl 18 were intended to overcome any inequities in a result achieved by the terms of the Partnership Agreement, and that the arbitrator erred in law in failing to give effect to cl 18.

Exercise of the discretion

[37] The principal issue is the strength of the applicant's case.

[38] The effect of the award is to confer on successive versions of the partnership a form of perpetual existence for the purposes of capital repayment obligations, with the result that the payment entitlements of the applicants might well be postponed for many years. The arbitrator reached his conclusion by determining that there ought to be a departure from the ordinary meaning of the words used in cl 15 of the Partnership Agreement. I have determined that, with one exception,[10] the questions raised by the applicants are of some weight and are strongly arguable. Moreover, issues related to the proper construction and application of ss 45 and 47 of the Partnership Act 1908 carry some precedent effect.

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[10] Above at [23].

[39] I deal briefly with the remaining discretionary factors.

[40] Those which point against the grant of leave are the fact that these were the very questions of law posed for determination by the arbitrator and did not arise incidentally, and that the arbitrator is not only legally qualified but is an eminent lawyer. However, several factors suggest that it would be proper to grant leave. The amount at stake is, in my view, substantial. Substantiality is to be determined by reference to what the parties to the application might consider to be significant. I am satisfied that these claims for amounts totalling not much less than $200,000 are substantial from the point of view of all concerned.

[41] A second allied question is the significance of the dispute to the parties. Both at a practical and a professional level, I consider that this dispute is important. It arises from the relationship of well-respected legal practitioners in Napier and raises matters of vital significance to all those affected. Of particular importance is the fact that a proportion of the amounts owed represents work in progress in the former firm. The applicants have paid tax on that portion and the respondents have claimed a tax deduction in respect of those same payments. That consideration suggests that an element of hardship may have resulted to the applicants by reason of the award. It is appropriate, in my view, to take into account the concluding sentence in cl 18 of the Partnership Agreement as a discretionary factor as well.[11]

[42] Then there is the consideration that, not only does the award decline to make provision for interest, but it may result in a very significant delay in payment of capital as well. The result may well be that the sums owed will be substantially eroded in value over time. It is not suggested that questions of delay are relevant. Neither is there anything in the Partnership Agreement that provides for the arbitral award to be final and binding.

[43] In my opinion the discretionary factors, considered together, clearly support the grant of leave. I therefore propose to grant leave in respect of those questions which I have earlier identified as being strongly arguable by the applicants.

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[11] Above, at [11].

Result

[44] The application for leave to appeal is granted in respect of the following questions:

(a) Whether the arbitrator's interpretation of the provisions of cl 15 of the Partnership Agreement is correct.

(b) Whether the arbitrator erred in his interpretation of what was required for there to be a "final settlement of accounts" for the purposes of s 45 of the Partnership Act 1908.

(c) Whether the arbitrator erred in his interpretation of the Partnership Agreement and/or the Partnership Act 1908 in finding that there was no requirement to pay interest on the amounts due pending payment.

(d) Whether the arbitrator erred in his interpretation of the Partnership Agreement and/or the Partnership Act 1908 in finding that the provisions of the Partnership Agreement contained an "agreement to the contrary" which negated the obligation to pay interest in accordance with s 45 of the Partnership Act 1908 on the sums due by the respondents to the applicants.

(e) Whether the arbitrator erred in law by failing to give effect to the concluding words of cl 18 of the Partnership Agreement.

[45] The applicants are to consult with the Registrar in order to have the proceeding placed in a telephone conference list with an Associate Judge.

[46] The applicants are entitled to costs. Counsel should file memoranda if they are unable to agree.

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C J ALLAN, J.