JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 128/00

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**BOOK TRADERS (CARIBBEAN) LTD**	**APPELLANT**
AND	**JAMAICA GENERAL INSURANCE CO LTD**	**RESPONDENT**

Maurice Manning instructed by Patrick Brooks of Nunes, Scholefield, DeLeon & Co for the Appellant

Ransford Braham and Susan Risden-Foster instructed by Livingston, Alexander & Levy for the Respondent

11th, 12th, 13th, 14th December 2001
& 20th December 2002

FORTE, P:

On October 13, 1994 Jeffrey Young, an employee of the appellant Book Traders (Caribbean) Ltd, suffered serious bodily injury in an accident. This occurred while he was a passenger in a vehicle driven by another employee of the company and which had been dispatched to Montego Bay for purposes connected with its trade. At the material time the appellant was covered by a policy of insurance (lettered and numbered EL-O1313), with the respondent,

Jamaica General Insurance Co., Ltd. By this policy the respondent agreed to indemnify the appellant in the following terms:

> "Now this policy witnesseth that if any employee in the Insured's immediate service shall sustain bodily injury by accident or disease caused during the Period of Insurance and arising out of and in the course of his employment by the Insured in the Business
> The Company will subject to the terms exceptions and conditions contained herein or endorsed hereon ...indemnify the Insured against liability at law for damages and claimant's costs and expenses in respect of such injury or disease and will in addition pay all costs and expenses incurred with the Company's written consent.
>
> By clause 10 of the policy, the parties agreed that 'all differences arising out of this Policy shall be referred for the decision of an Arbitrator to be appointed in writing by the parties in difference'...".

As a result of the injuries he received in the motor vehicle accident on the 13th October 1994, Jeffrey Young made a claim per his Attorneys, on the respondent, by letter dated April 25, 1995. Also, by letter dated August 28, 1995, a copy of which was sent to the respondent, a formal claim was made for compensation. On September 4, 1995 the respondent wrote advising that, "we are now in possession of our attorney's opinion, and can confirm that our clients liability policy cannot operate under the circumstances of this loss."

On 26th March 1996 a Writ of Summons and Statement of Claim were filed on Jeffrey Young's behalf to recover damages from the appellant. No defence was filed in the action and judgment in default of defence was obtained on August 19, 1996. On May 12, 1997 an application to set aside the default

judgment was refused. On 17th July 1997, an appeal from that order was dismissed. As a result, the matter went to Assessment of Damages and on July 30, 1997 damages were assessed and final judgment handed down in favour of Mr. Young in the sum of nearly $35m.

In the course of things differences arose between the appellant and the respondent and as a result, in keeping with the terms of the policy, these differences were referred to Arbitration for resolution. Of these, only one is relevant to the appeal before us and that is as follows:

> "(C) If Book Traders (Caribbean) Limited is entitled to an indemnity under the Policy, is the indemnity in the amount of $10 million, and is Book Traders Caribbean Limited entitled to interest thereon and if so, for what period and at what rate?"

Oral hearings before the Arbitrator took place between January 12 and April 19, 2000, and the Final Award was published on June 7, 2000. In so far as is relevant for the purposes of this appeal, the Award stated in paragraphs 3 and 4:

> "3. That the amount of the indemnity to which the Insured (the appellant) is entitled is $10,000,000.00, the policy limit of the Policy.
>
> 4. That the Insured is entitled to interest on the aforesaid sum of $10,000,000.00 at the rate of 6% per annum from July 31, 1997 to June 30, 1999 and at the rate of 12% per annum from July 1, 1999 to the date of this award."

The Arbitrator gave detailed reasons for coming to these conclusions, which are set out hereunder.

"(ii) **Interest**

The Insured claims interest at a commercial rate. The Insurer, on the other hand, submits that the contract of insurance is a contract of indemnity and that the Insured is not entitled to interest at a rate higher than that applicable to judgment debts. I am satisfied that as Arbitrator I would have the same powers as a Court to award interest, pursuant to the Law Reform (Miscellaneous Provisions) Act (see ***Raymond International (Jamaica) Ltd. v. Government of Jamaica*** (suit no. C.L.M. 60 of 1974) and ***Marley & Plant v. Mutual Housing Ltd.,*** S.C.C.A. nos. 3, 4 & 5 of 1987, judgment delivered February 5, 1988) (although I am strictly speaking asked to declare what is the Insured's entitlement rather than to make an award). However, I am not satisfied that it would be appropriate in this case for the Insured to receive interest at a commercial rate, in accordance with the modern principle accepted by the Court of Appeal in the case of ***Delbert Perrier v. British Caribbean Insurance Co. Ltd.,*** S.C.C.A. no. 11/94. I agree with counsel for the Insured that the insurance contract is one of indemnity and I think that to award interest at a rate higher than that payable by the Insured on its judgment debt to Mr. Young would be to provide the Insured with an unjustifiable windfall. I therefore take the view that the rate of interest should be that applicable to a judgment debt. I accept the principle of the dictum of Templeman J in the case of ***Business Computer Ltd. v Anglo African Leasing Ltd*** [1977] 2 All ER 741, 750 (restating and adopting earlier dicta by Lord Denning MR and Lord Herschell LC), and that the Insurer should pay interest. With regard to the effective date from which interest should be paid, the Insured submits for June 12, 1995, as the date by which the Insurer should have accepted liability. In my view, though it is clearly arguable that the Insurer might have proffered payment of the policy limit at some earlier point, the appropriate date for the payment of interest cannot in this case precede the date of the judgment after assessment of damages against the

> Insured (i.e., July 30, 1997). While I accept that the 'assured's right to recover under a Third-Party policy comes into being as soon as he has furnished proof of his liability in accordance with the terms of the policy' (Colinvaux, op.cit.,para.19.12), the fact is that in this case the Insured was in fact still seeking on appeal to set aside the judgment in default of defence against it as late as July 17, 1997 (i.e. two weeks before the Assessment of Damages – see the judgment of the Court of Appeal in S.C.C.A. no. 59 of 1997, delivered on November 10, 1997). In these circumstances, I do not think that it would be just to ask the Insurer to pay interest over a period in which the Insured (for whatever reason) was actively contending that the judgment against it should be set aside to permit it to defend the action on its merits. As Lord Hope points out in the recent decision of the House of Lords in ***Wisely v. John Fulton (Plumbers) Ltd*** [2000] 2 All E.R. 545, 548 'The general principle of the common law is that, apart from contract, a party will only be entitled to interest on money if the principal sum has been wrongfully withheld and not paid on the day when it ought to have been paid'. In my view it cannot be fairly said in this case that the amount of the indemnity 'ought to have been paid' before July 30, 1997. I therefore conclude that interest should be payable on the sum of $10,000,000.00 at 6% from July 31, 1997 to June 30, 1999 and at 12% from July 1, 1999 to the date of the award. (The rate of interest payable on judgment debts was increased from 6% to 12% on July 1, 1999 – see ***The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 1999.)***

On the day after the Award was handed down i.e. 8th June 2000 the Attorneys for the appellant wrote to the Attorneys for the respondent requesting payment of the Arbitrator's Award in the sum of $13,039,451.90. That sum represented the policy limit of $10 million plus interest calculated in terms of the Award. This was followed by another letter dated 22nd June 2000 demanding

payment of the sum awarded and threatening enforcement proceedings for failure to pay. In response, the respondent paid over the sum of $12,273,424.66 being the $10m indemnity plus interest which in their view had been incorrectly calculated by the appellants. This was duly accepted by the appellants. In spite of this, however the appellants filed an Originating Notice of Motion, apparently on the same day that it had received payment from the respondent. The grounds set out in the Originating Notice of Motion were as follows:

> "1. The said award is bad on the face of it, in that:
>
> (a) The Learned Arbitrator's basis for refusing to make an award of interest at commercial rates, was erroneous in Law;
> (b) The finding that an award of interest at commercial rates to the Applicant would be an unjustifiable windfall, was erroneous in Law and contrary to the relevant principles of Law in cases where payment has been wrongfully withheld;
> (c) The basis for the Learned Arbitrator's award of interest from July 30, 1997 and not from an earlier date, is erroneous in law, having regard to the relevant principles of Law applicable in cases of this nature;...".

An affidavit by Mr. Charles Levy, Director of the Respondent Company, in response to the motion was filed. This affidavit set out the demands made by the appellant for payment of the Award including the interest, and that as a result payment was made and accepted.

The motion was heard by Theobalds J, on the 29th September 2000, and apparently dismissed on a preliminary point relating to issue of the appellants

"approbating and reprobating." The substance of the motion was consequently never heard.

It is from this Order that this appeal now comes before us. The Grounds of Appeal read as follows:

> "1. The Learned Trial Judge erred in law by finding that the letters written by the Applicant/Appellant's Attorneys-at-Law demanding payment of the award and the acceptance by the Applicant/Appellant of the sum forwarded by the Respondent's Attorneys-at-law to the Applicant/Appellant's Attorneys-at-Law amounted to a waiver by the Applicant/Appellant of its right to challenge the Arbitrator's award.
>
> 2. The Learned Trial Judge erred in law by finding that there was 'no reason whatsoever to find that the award of the Arbitrator should be upset in any way, neither in relation to quantum, rate of interest, or effective date of the payment of interest as set out in the award', having regard to the clear errors of law on the face of the record, as disclosed by the Arbitrator's:
>
> (a) reasons/bases for declining to award interest at commercial rates and for fixing the date at which such interest should run which reasons were erroneous in law;
> (b) failure to apply the relevant principles of law in relation to the award of interest in commercial cases; and
> (c) failure to apply the relevant principles of law in respect of the date at which interest should run in cases of this nature."

The nature of Ground 1 is such that if we hold that the learned judge was correct in law in finding that the demands for payment of the award, and the subsequent acceptance of the payment amounted to a waiver, then there would be no need to address the complaints made in Ground 2. We must therefore firstly determine the merit of Ground 1.

The respondent maintained in answer to this ground, that by virtue of its conduct, the appellant has waived the right to question the Arbitrator's decision to refuse an award of interest at commercial rates. It contends that the appellant should not be allowed to approbate and reprobate, or as such conduct has been described, "to blow hot and cold". The argument is founded on the basis that since the appellant not only demanded the payment of the total sum of the award including interest, under threats of taking action to recover the amount, and accepted payment made in those circumstances it should not now be allowed to challenge the award in respect to the rate of interest.

The appellant, on the other hand contends that the "approbate and reprobate" principle is not applicable in the circumstances of this case. It maintains that the doctrine only applies where one has a choice of two rights, either of which he is at liberty to adopt. The doctrine has no applicability to the instant situation where the appellant has a right to the fruits of the award and the right to appeal the wrong exercise of discretion of the Arbitrator. The mere acceptance of an award or judgment, the appellant argues, does not prevent a litigant from pursuing an Appeal. What would be required is conduct after the

judgment or award showing an unequivocal intention to abandon any right of appeal or to waive same, and no such conduct has been shown in the instant case. The appellant took the position that despite the challenge to the award of interest under Question C, they were entitled to immediate payment in respect of the undisputed amount of the award.

In support of its contention, the respondent relied on several authorities. It will not be necessary to refer to all in coming to a determination of this issue.

Firstly, reliance was placed on the text, Russell on the Law of Arbitration by ***Walton & Victoria*** – 12th Edition at page 434 – paragraph entitled "Acquiescence by taking benefit of award." The learned authors in the cited paragraph states:

> "It will be a good answer to a motion to set aside an award if the opposing party can show that the party moving has acquiesced in the award by knowingly accepting a benefit under it."

The circumstances of the case of **Dexters, Ltd and Hillcrest Oil Co (Bradford), Ltd** 1925 All E.R. Rep. 273, upon which the respondent relies, is adequately set out in the headnote which reads as follows:

> "By contract in writing, dated Aug. 13, 1923, sellers sold to buyers 250 tons of 'dark cotton seed grease as per sample.' The buyers sold the goods to N. & Co. who in turn re-sold to D.C. & Co. The latter sold the goods to buyers in New York and Genoa, and shipments were made direct to those sub-buyers by the original buyers. The sub-buyers rejected the goods as not being in accordance with sample, and the matter went to arbitration by which the buyers agreed to be bound. The umpire awarded to D. C. & Co. £3,745 damages for breach of contract and

> ordered N. & Co. to pay the costs, and the buyers paid that amount awarded to D.C. & Co. In an arbitration between the original buyers and the original sellers the umpire made an award in the form of a Special Case in which he stated that the goods delivered by the sellers did not comply with the contract description, and that the buyers were entitled to recover from the sellers £2,000 damages. On July 27, 1925, the Special Case came before Roche, J., who confirmed the award. On July 29 the buyers applied to the sellers for payment of the £2,000 'pursuant to the award of the arbitrator as upheld by the judge.' This was paid by the sellers. The buyers then appealed against the order of Roche, J., and asked that the order be reversed in so far as it was adjudged that the umpire had assessed the damages rightly and on the right basis, and that it might be ordered that a higher, alternative, basis of damages should be adopted. On a preliminary point,
> **Held**: the buyers having obtained payment of the £2,000 under the award and decision of Roche, J., could not approbate and reprobate, and so were not entitled to appeal against the order of the learned judge."

In coming to his conclusions Bankes LJ offered the following opinion at pages 275e – 276a:

> "In my opinion, it is plain that the person who took that step and got the order of the court to enforce an award for £2,000 could not afterwards say: 'That award is altogether wrong; it ought to be something else, and now I will ask the Court of Appeal to say that it should be something else.' I do not think there is any difference between a party who takes that course because the opposing party will not pay what is demanded without an order, and the case, as here, where the application is made and the payment is made, because in substance an application of this kind seems to me to mean this: 'The judge has held that the amount of damages should be £2,000. Will you please pay that amount in order to save us and yourselves the expense of applying for an order?'

> That is what, in substance, this application comes to, and the answer is: 'Yes, we will pay for it.'
> It seems to me quite impossible for a person who has taken up that attitude to turn round and, having got the money, to say: 'The award is all wrong.' He is obliged to say that in order to found his case for the claim to the larger amount. It seems to me that whatever else his rights may be, it is quite clear that, having taken the money, he cannot say that the award under which that particular sum was paid to him was not the right view of his legal position."
> [pages 275E to 276A]

In coming to the same conclusion, Warmington, LJ had this to say (at page 276-277):

> "The object of the appeal is to induce this court to say that the second of the three alternative awards is the one which ought to be the award of the umpire, and if the appeal had succeeded that would be the result, that the second of the three alternative awards would be substituted for the first. The learned judge having decided that the first of the three alternative awards was the right award to make, the buyers wrote to the sellers this letter: 'We shall be glad if your clients will now let us have remittance for £2,032 pursuant to the award of the arbitrator as upheld by the judge yesterday.' That was to say that the first of the three alternative awards being the award of the umpire, they now asked the sellers to make the payment pursuant to that award. On Aug. 21 the sellers answer that letter in these terms: 'We now have received and send you herewith our clients' cheque for the sum of £2,032, payable pursuant to the umpire's award.' The effect of that letter seems to me to be two-fold. It acts on the assumption that the first of the three alternative awards is the right award, and, acting on that assumption, debars the person who paid the money from saying that the third alternative award is the award which should be adopted. The receipt which was given by the buyers on receiving that cheque was given in this form: 'Received, the sum of £2,032 in payment of the

> amount payable under the umpire's award in the arbitration between us.' That was on Aug. 24, and within five days the buyers gave notice of appeal.
> It seems to me perfectly hopeless to contend that they were entitled to give that notice of appeal after they had deliberately accepted the first alternative award as being the award of the umpire, and had put their opponents in the position of having debarred themselves from proceeding and saying that the third award was the right one."

The above cited case certainly was not a case in which the appellant elected to pursue one right as opposed to another. On the contrary the appellant was the beneficiary of an award which was one of the alternatives opened to the Arbitrator to grant to him. Having accepted it, he nevertheless attempted to challenge the correctness of the award. In those circumstances the Court held that he could not say, having accepted the money, that that particular sum was not awarded within the correct legal position.

The case of ***European Grain and Shipping Ltd v. Johnston*** (1982) 3 All E.R. 989 was also relied on by the respondent. This case involved the sale of wheat in three installments of two hundred tonnes each. The third and last delivery was short by one hundred tonnes. A dispute arose between the parties. The sellers were claiming payments of one hundred tonnes they delivered, while the buyers cross-claimed for the outstanding one hundred tonnes to be delivered. The matter was referred to Arbitration, and three Arbitrators were appointed. Before the submissions were completed, the Arbitrator appointed by the seller had to proceed abroad, so he stated his views in writing. He also signed a blank form. Regrettably, the other two Arbitrators did not agree with

his views, so they filled in the blank form with their decision and added their signatures. The award was in two parts. The buyer was ordered to pay the sellers for the one hundred tonnes received. However, in respect of the cross-claim, it was ordered that the sellers should pay the difference between the market price and the contract price of the undelivered portion. The buyer duly paid the amount due, and this was accepted by the seller. The sellers did not pay as ordered. Instead they filed a notice of motion seeking to set aside that part of the award requiring them to pay, claiming that they had not been given an opportunity to consider any evidence or document in support of the claim.

It was held (dismissing the appeal):

> "... It followed that since the arbitrator appointed by the sellers had not actually participated in the award, although on the face of it he appeared to be a party to it, there were grounds for setting aside the whole award. However, since the sellers had accepted the benefit from the first part of the award, they could not afterwards dispute the award by challenging the second part."

In coming to his conclusion in that case Lord Denning at page 992 stated his opinion thus:

> "But there is this further point which emerged in the course of discussion: namely that in this particular case the sellers took advantage of the first part of the award, because the buyer paid over the sum of £2,775. He paid that and the interest which had been awarded on it, and the sellers received that payment. Thereby they affirmed that part of the award. They accepted the benefit of it plus the interest. It seems to me quite impossible for them to say, 'Oh, well; we like that part of the award but we do not like the other part where we were ordered to pay damages.

> We do not like that and therefore we want it set aside.'
> That certainly cannot be done."

This case establishes that a party to an arbitration cannot accept one part of an award, in the sense of having benefited from it in terms of receiving the sum awarded, and thereafter seek to challenge the other part of the award that is not beneficial to it.

In the instant case, however, the appellant maintains that it did not accept a "part of the award", but instead accepted all of the award, and seek now only to challenge the order as to the rate of interest. The appellant has received no more than it was entitled to under the award, and can now seek to challenge the rate of interest allowable on the awarded sum.

For this proposition counsel for the appellant seeks the support of the House of Lords' case of ***Lissenden v. C.A. V. Bosch Ltd*** (1940) 1 All E.R. 425. This was a case dealing with an arbitrator's award of compensation to a workman who had been incapacitated by an industrial disease. The workman accepted the arrears of compensation award, signed a receipt and costs were paid. Thereafter an appeal was launched, on the ground that weekly payments were terminated and he had not completely recovered from the effects of the industrial disease.

It was held that "in accepting the arrears of compensation, the workman was exercising a legal right to be paid what was admittedly due to him, and in serving his notice of appeal, he was exercising another and independent legal

right of claiming the future relief to which he maintained he was entitled. The case, therefore was not one of election and the workman had a right of appeal."

It is of some note that Viscount Maugham, gave some consideration to the meaning of the maxim that one may not both approbate and reprobate, and concluded that the maxim "as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law which finds its place in our records as early as the reign of Queen Elizabeth." He thereafter continues:

> "It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive tort and claim as in contract, or whether, in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice."

Then in the following words he made it clear that the doctrine could not apply to the circumstances of the case. He stated at page 430:

> "My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925. For the present purpose, there is no difference between the two. Both are the result of judicial proceedings. The Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act."

In those circumstances, he opined that the doctrine of election was not applicable to the circumstances of that case.

Lord Wright in his speech also noted that the Arbitrator's Act did not apply to arbitration under the Workmen's Compensation Act, and so for that reason there was no difference between a judgment and an award of a County Court Judge made under the Workmen's Compensation Act. He reasoned as follows:

> "The procedure originally contemplated by the Workmen's Compensation Act was that claims should be settled by arbitration, but it was competent to bring the arbitration in the county court before the county court judge as arbitrator. To-day, the great majority of such claims are thus dealt with in the county court. There are statutory rules governing the procedure there, and in effect equating the procedure in such claims to those in an ordinary action. In particular, the rules as to appeals are put on the same footing as ordinary appeals from county courts: the Workmen's Compensation Act, 1925, Sched. 1(4), and the rules made under it. Thus, the Rules of the Supreme Court as to appeals from county courts apply."

Then later in his speech, he again pointed out the difference between an award made under the Workmen's Compensation Act, and an award made in a normal arbitration. He said:

> "In arbitration in the ordinary sense, the award is the fruit of a consensual agreement under which the parties have agreed to accept the arbitrator's award, which thus governs them by their agreement. There is no appeal in the proper sense of the term. The court has certain powers over arbitrators, which the parties may invoke. Thus, a party may claim that the award was made without jurisdiction, or that the arbitrator was guilty of misconduct, and that, for these or other like

recovering the fruits of the award including the interest which has now become the subject of this appeal. The first of these letters dated 8th June 2000 reads as follows:

> "We refer to the captioned and the Award made by the Arbitrator on the 7th June, 2000. We are instructed to request on behalf of the Liquidator that you let us have settlement of the Arbitration award in the sum of $13,039,451.90 arrived at as follows:
>
> | | |
> |---|---|
> | Policy Limit | $10,000,000,00 |
> | Interest at 6% on $10,000,000.00 From the 27th July, 1997 to 14th July 1999 (717 days) | 1,964,383.50 |
> | Interest from 15th July, 1999 to the 7th June 2000 at 12% 327 days | 1,075,068.40 |
> | Total | $13,039,451.90 |
>
> Having regard to the length of time which has expired to arrive at this conclusion, we should be grateful if payment be made expeditiously.
>
> We will write separately with respect to our costs."

It should be noted that the claim in the letter remained faithful to the terms of the award, and raises no question in relation to the rate of the interest awarded.

Apparently, not having received payment from the respondents, the appellant's attorney, again wrote to the respondent's attorney on the 22nd June 2000. This letter, however is in the nature of demand, and indicated a time limit for payment on the failure of which an application would be made to the court. It reads:

> reasons, the award should be set aside. A party who has treated the award as valid, for instance, by accepting payment of what it awarded him, would generally be barred from adopting the inconsistent attitude of claiming to set it aside. It might then be said that he could not affirm and disaffirm, or perhaps even that he could not approbate and reprobate. I think it is clear, however, that the position in a case like the present, that of an award by the county court judge, which is put on the same footing as an ordinary judgment of the court, is an entirely different matter."

It is obvious that this case cannot avail the appellant, as it dealt with a regime under the English Workmen's Compensation Act which treats awards by a county court judge under it, as ordinary judgments of the court. The nature of an award under the Arbitration Act is of a different character. It results from an agreement by the parties to subject the resolution of their dispute to an Arbitrator and to accept any award given by him which has no error on the face of it.

A valid award confers on the successful disclaimer a new right of action, in substitution for the right on which his claim was founded. Every submission to arbitration contains an implied promise by each party to abide by the award of the arbitrator, and to perform his award. It is on this promise that the claimant proceeds, when he takes an action to enforce the award: (See The Law and Practice of Commercial Arbitration in England by ***Mustill and Boyd*** at page 27). It is because of this newly acquired right of action resulting from the award that led the appellant to write the following letters to the respondent's attorney which are set out hereunder for a better understanding of the appellant's insistence on

> "The delay in the payment of the award made by the Arbitrator is only benefiting your client.
>
> It is unconscionable that our client must continue to wait at the whim and fancy of yours to receive the fruits of the award.
>
> Your client continues to wrongfully withhold payment to ours and we therefore demand that your client pays over the amount awarded by close of play on Friday June 23, 2000, failing which, we shall have no alternative but to apply to the Court for appropriate orders to enforce the award.
>
> Quite frankly, the writer is greatly disturbed by this turn of events and trust that further litigation may be avoided."

It is in response to these letters, that the respondent paid over the sum of $12,273,242.66 being the $10 million indemnity plus the interest which had been incorrectly calculated by the appellant in the letter of the 8th June, 2000.

In neither of its letters to the respondent, and in particular the letter of demand threatening legal proceedings, did the appellant indicate that it was still disputing the award of interest made by the Arbitrator. Instead, the appellant demanded and received, in settlement of the award, the total amount awarded by the Arbitrator. Having received the payment, the appellant seeks to challenge the Arbitrator's award in respect of the rate of interest. In my view the appellant having accepted the award, and in particular having done so under threat of further legal proceedings, without indicating any reservations as to the total amount of the award (including the interest) cannot thereafter challenge the award. If it wanted to challenge that aspect of the Arbitrator's award, then the

appellant ought to have refrained from demanding that part of the award and indicate its reason for so doing, by notifying the respondent who would then have had the option to withhold that part of the award until the dispute was settled by the Court. In my view the principles stated in the cases (supra), relied upon by the respondent, are applicable to the circumstances of this case.

Indeed, the case of ***Lissenden*** (supra) relied on by the appellant, is distinguishable from these circumstances, and is supportive of the respondent's contentions. As Lord Wright stated in that case, a party who has treated the award as valid for instance by accepting payment of what it awarded him, is generally barred from adopting the inconsistent attitude of claiming to set it aside. The appellant, in the instant case, demanded and accepted the rate of interest awarded and cannot thereafter move to set it aside so as to gain a greater rate of interest.

I would conclude that the appellant is estopped because of its conduct, from now challenging the Arbitrator's award in this regard, and that Theobalds, J was correct in ruling as he did.

Though the arguments advanced on the second ground of appeal concerning the applicable rate of interest to be awarded in circumstances such as existed in this case, are interesting, the conclusions arrived at in respect of ground 1, makes it unnecessary to determine that issue in this appeal.

In the event, I would dismiss the appeal and affirm the order of the Court below.

The appellant must pay the costs of the respondent, such costs to be taxed, if not agreed.

LANGRIN, J.A.

I agree.

PANTON, J.A.

I agree fully with the reasoning and conclusion.