HIGH COURT OF AUSTRALIA

Government Insurance Office Of N.S.W.

Vs.

Atkinson-Leighton Joint Venture

(Barwick C.J.(1), Stephen(2), Mason(3), Murphy(4) and Wilson(5) JJ.)

19 February 1981

BARWICK C.J.

1. Atkinson-Leighton Joint Venture (the respondent) contracted stage of a port and industrial development at Botany Bay. The work principally consisted of the construction of an armoured embankment extending from the northern shore of the bay in a generally southward direction. Behind the wall a considerable reclamation of land was to be effected. The embankment was to be constructed by the placement of rock of various sizes without any binding material to form a core. When complete, the core would be some thirty feet above the water level of the bay and would be protected by what was described as armouring. (at p208)

2. The work commenced in 1971. By the early part of 1974 the core of the embankment had progressed some distance out into the bay. (at p208)

3. The respondent entered into a policy of indemnity with the Government Insurance Office of New South Wales (the appellant), covering itself against all but certain excluded risks. The policy was styled a "Contractors' All Risks Policy". It is necessary to set out the principal parts of this policy as the fate of this appeal turns upon the application of its terms: "SECTION 1 of POLICY

PROPERTY INSURED

(Material Damage)

The Office hereby agrees with the Insured that if at any time during the period of insurance stated in the Schedule, or during any further period of extension thereof, the property or any part thereof described in the Schedule shall suffer any unforeseen loss or damage from any cause other than those specifically excluded, in a manner necessitating repair or replacement, the Office will pay or make good all such loss or damage up to an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in all the total sum expressed in the said Schedule as insured hereby.
The Office will also reimburse the Insured for the cost of clearance of debris following upon any event giving rise to a claim under this Policy but not exceeding in all the sum set opposite thereto in the Schedule.

EXCLUSIONS TO SECTION 1
The Office shall not, however, be liable for:

(a) the deductibles stated in the Schedule to be borne by the Insured in

any one occurrence other than lightning or explosion;

. . .
(j) loss or damage caused by fire."
"GENERAL EXCLUSIONS
The Office will not indemnify the Insured in respect of loss, damage or

liability directly or indirectly caused by or arising out of
(a) war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, mutiny, military or usurped power, confiscation, commandeering, requisition or destruction of or damage to property by order of the government de jure or de facto or by any public authority,

(b) nuclear reaction, nuclear radiation or radioactive contamination,
(c) wilful act or wilful negligence of the Insured,
(d) cessation of work whether total or partial.
In any action, suit or other proceeding where the Office allege that by

reason of the provisions of Exclusion (a) above any loss, destruction, damage or liability is not covered by this insurance the burden of proving that such loss, destruction, damage or liability is covered shall be upon the Insured."

"SECTION 1 - PROPERTY INSURED SUM INSURED
1. Contract Works, Temporary Works,
Architects, Engineers and Surveyors
fees 1. $31,920,569
. . .
DEDUCTIBLES:
Amounts to be borne by the Insured in respect of each and every occurrence

arising out of
(a) earthquake, storm, tempest, hurricane, cyclone, flood, inundation, subsidence, landslide, collapse or loss or damage by water the first $100,000
(b) any other cause, except lightning and explosion the first $5,000".

"ENDORSEMENTS
1. It is hereby agreed and declared that the Office shall not be liable

for:
(a) loss of or damage to the channel by silting or any other cause nor liability arising from the dredging of the channel during the currency of the policy;
(b) loss of or damage to surrounding property or foreshores caused solely by the existence of the works under construction.
2. It is hereby agreed and declared that all loss or damage suffered during a 'defined period' caused by storm, tempest, flood or loss or damage by water shall be deemed to have been suffered in the one occurrence for the purpose of Clause (a) of the exclusions to Section 1 of the policy. The Insured shall select the time when a 'defined period' shall commence but no two selected 'defined periods' shall overlap.

A 'defined period' shall end at the termination of a period of 24 hours during which 24 hours the maximum significant height of wave trains recorded is less than 50% of the maximum significant height of the wave train or trains recorded during the period from the commencement of the 'defined period' to the time of commencement of the said period of 24 hours OR on the expiry of a period of 72 hours from the commencement of the 'defined period', WHICHEVER SHALL FIRST OCCUR. For the purpose of this insurance the Wave Recording Station will be located off the entrance to Botany Bay and operated by Maritime Services Board of New South Wales. The closest recording station to the above will be considered as an alternative should the first mentioned station malfunction.
3. It is hereby agreed and declared that all loss of, or damage to, property occurring during any one period of 48 consecutive hours during the currency of the Policy arising out of or caused by earthquake shall be deemed to have been caused by a single occurrence and therefore to constitute one loss for the purposes of this Policy.
Should the cause mentioned above be prolonged the Insured shall select the time from which any such period shall commence but no two such selected periods shall overlap.
Whatever period of 48 consecutive hours is used for the purpose of this clause shall also be used for the purpose of any deductible provisions on this Policy."

"PROVISIONS APPLYING TO SECTION 1
Memo 1. Sum Insured: It is a requirement of this insurance that the

amounts of insurance stated in the Schedule shall not be less than
for item 1: the full value of the contract works at the completion of the construction, inclusive of materials, wages, freight, customs duties, dues and materials or items supplied by the Principal.
The Insured undertakes to notify the Office of any facts affecting a material increase or decrease of the sums insured.
In the event of a claim or claims under this Policy in respect of loss or damage to the Property Insured, it is mutually agreed to reinstate the insurance to the full sums insured stated therein from the time of the loss, accident or occurrence up to the expiry of the insurance in consideration of the payment by the Insured of a proportionate additional premium, but nevertheless the Office shall never be liable for more than the respective items insured stated herein in respect of any one loss, accident or occurrence.
Memo 2. Basis of Loss Settlement: In the event of any loss or damage the basis of any settlement under this Policy shall be (a) in the case of any damage which can be repaired - the cost of repairs necessary to restore the property to its condition immediately before the occurrence of the damage less salvage, or
(b) in the case of a total loss - the actual value of the property immediately before the occurrence of the loss less salvage, provided always that the provisions and conditions have been complied with.
The Office will make payments including progress payments only after being satisfied by production of the necessary bills and documents that the repairs have been effected or replacement has taken place, as the case may be.
All damage which can be repaired shall be repaired, but if the cost of repairing any damage equals or exceeds the value of the property immediately before the occurrence of the damage, the settlement shall be made on the basis provided for in (b) above. The cost of any alterations, additions and/or improvements shall not be recoverable under this Policy."

"GENERAL CONDITIONS
. . .
All differences arising out of this Policy shall be referred to the

decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators, one to be appointed in writing by each of the parties, within one calendar month after having been required in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire to be appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings. The Arbitrators and the Umpire shall be qualified Engineers. The making of an award shall be a condition precedent to any right of action against the Office.
If a claim is in any respect fraudulent, or if any false declaration is made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy, or if a claim is made and rejected and no action or suit is commenced within three months after such rejection or, in case of arbitration taking place as provided herein, within three months after the Arbitrator or Arbitrators or Umpire have made their award, all benefit under this Policy shall be forfeited.
. . . " (at p212)

4. Commencing on 20th February 1974, a very severe storm (the February storm), with high winds and seas, caused considerable damage to the exposed core of the embankment. Between that date and 25th May 1974, work was done in its repair. By the latter date, subject to the expenditure of a further sum of $4,421.58, the embankment had been restored to the condition in which it was before the February storm. However, during this period of repair damage was done to the embankment under repair and within the area of the damage of the February storm by further adverse weather which, by necessitating additional work in the repair of the embankment, increased the cost of that repair. (at p212)

5. On 25th May 1974, a very severe storm (the May storm) did considerable damage to the repaired embankment. Between 25th May 1974, and 27th February 1976, work was done on the embankment to repair the damage done by the May storm, but again during this period there were a number of occasions, "episodes", on which, due to the condition of the wind and sea, damage was done to and within the area of the embankment under repair which increased the cost of its ultimate restoration to the condition in which it was before the May storm. (at p212)

6. Disputes having arisen between the respondent and the appellant as to the appellant's liability to pay the increased costs of the repair of the embankment due to these episodes and as to certain other items of claim on the part of the respondent, the disputes were referred to arbitration pursuant to the general conditions of the policy. In due course, the arbitrator stated a special case for the opinion of the Supreme Court on questions of law asked by him. In substance the Court was asked whether the respondent was entitled to recover amounts found to have been spent on making good the effect of the weather during these various episodes. The Supreme Court (Meares J.) answered these questions favourably to the respondent. The arbitrator then made his award incorporating in it the reasons for judgment of the Supreme Court in answering the questions of the special case. The award favoured the respondent. The appellant then appealed to the Court of Appeal Division of the Supreme Court, seeking to set aside the award for error of law appearing on its face, the error of law being constituted by the opinion of the primary judge on the questions in the special case. The parties accepted the position that if the primary judge was in error in law in the answers he gave, an error of law appeared on the face of the award. (at p213)

7. The Court of Appeal, by majority, did not think the primary judge was in error in those answers, refused to set aside the award and dismissed the appeal. The appellant now appeals to this Court,

seeking the same relief as it had sought of the Court of Appeal. (at p213)

8. It would now be convenient to extract the findings of the arbitrator as set forth in his special case. I will do so in narrative form. (at p213)

9. By 19th February 1974, the embankment had extended a considerable distance into Botany Bay, different parts of it being in varying stages of construction. Between 20th and 23rd February, high winds generating wind waves on top of a considerable swell caused very considerable damage to the exposed core of the embankment and to various other stages of its construction. Repair of the embankment was straightway undertaken and continued throughout until 25th May 1974. (at p213)

10. High wind and swell on the evenings of 14th and 15th March broke through the previously partly repaired core and rear filler. Such damage would not have taken place had it not been for the state to which the embankment had been brought by the February storm. (at p213)

11. Between 10th and 16th April 1974, a heavy swell overtopped the low level embankment, doing severe damage to the previously partly repaired core and rear filler. Only 20 per cent of this damage would have taken place had it not been for the state to which the embankment had been brought by the February storm. (at p213)

12. The damage to the embankment done by the March, April and May episodes occurred within the area of damage done by the February storm, which damage had been by then partly repaired. The costs of repairing such damage were all costs of repair done in the course of restoring the embankment to its condition immediately before the February storm, and were also all costs of restoring it to its condition immediately before the March, April and May episodes respectively. The arbitrator found the amount by which the cost of repair had been increased by the March, April and May 1974 episodes respectively, the total of these three several sums being the sum of $127,452.33. (at p214)

13. The appellant paid to the respondent the amount expended in the repair of the damage done by the February storm less an amount agreed between the parties as deductible under the policy (Section 1: Deductibles) and less the sum of $127,452.33, the liability for which the appellant disputed on the footing that each episode of March, April and May constituted a separate source of claim in respect of which sub-clause (a) of the 'Exclusions to Section 1' entitled the appellant to deduct the sum of $100,000, leaving no sum payable in respect of the cost of repairing the damage done in those three episodes. (at p214)

14. As already indicated, by 25th May, the damage done by the February storm and by the several intervening episodes to the partly repaired embankment had been almost fully repaired. What repair remained would have cost $4,421.58. The embankment would then have been in the same condition as it was before the February storm. (at p214)

15. Severe and extensive damage to a great part of the embankment resulted from a severe storm which occurred between 25th and 29th May 1974 (the May storm). Repairs to the damage done by the May storm were undertaken forthwith and continued between that date and 27th February 1976. Meantime, there were a number of occasions on which damage was done to the work under repair, thus increasing the cost of restoring the embankment to the condition in which it was before the damage done to it by the May storm. (at p214)

16. Between 8th and 14th June 1974, damage was done by the sea to the work under repair and

there were episodes in July, August, October and December 1974, February 1975, 12th June 1975 and 21st June 1975, where the conditions of wind and sea did damage to that work, thus further increasing the cost of restoring the embankment to the condition in which it was prior to the May storm. With respect to each of these episodes, the arbitrator found the amount by which they increased the cost of repair. Those amounts totalled the sum of $345,635.37. The arbitrator also, in each instance, stated a percentage of the damage done by the episode which would not have taken place had the embankment not been damaged by the May storm. (at p214)

17. The arbitrator found that the damage which occurred during these eight episodes was all damage done to parts of the work in the course of repair of the damage resulting from the May storm, with the exception that, at the time of the second episode of June 1975, the embankment had been constructed beyond its point of progress before the May storm and that $25,000 of the cost of repair was attributable to repair of the damage to this additional work on the embankment. (at p215)

18. The arbitrator found that "the costs of repairing such damage (less such sum of $25,000) were all costs of repairs done in the course of restoring the embankment to its condition immediately before the May 1974 storm, and also all costs referable to the episodes were all costs of restoring the embankment to its condition immediately before each of the eight episodes respectively". (at p215)

19. The appellant has paid to the respondent the total cost of restoring the embankment to its pre-May 1974 condition, less the agreed deductible amount under sub-cl. (a) of the "Exclusions to Section 1" and the sum of the amounts found by the arbitrator as referable to costs of repairing the damage done in each of the eight episodes, namely $345,635.37. The appellant has denied liability for any of these later amounts on the footing that each episode constituted the basis of a separate claim under the policy and that the clause as to deductibles applied to each episode, which being applied left no sum payable by the appellant in respect of any of those episodes with the exception of a small sum in the case of the August 1974 episode. (at p215)

20. The other items of claim in dispute I will leave till later in these reasons. (at p215)

21. The promise of the appellant is to pay or make good all loss or damage up to specified amounts which any of the property scheduled to the policy should suffer from any cause other than those specifically excluded. The causes of loss or damage which are excluded are set out in the general exclusions clause. No question about the application of these provisions arises in this appeal. The damage done to the embankment by the February and May storms was damage of the kind for which the appellant is liable under the policy. (at p215)

22. The deductibles stated under the heading "Exclusions to Section 1" are not excluded causes of loss or damage. They do not amount in any sense to exclusions within the promise to indemnify. The provision for deductibles does not really qualify the promise to afford an indemnity for loss or damage by excluding a cause from the causes occasioning the obligation to indemnify. It forms part of the mechanism for determining the particular amount to be paid in performance of the promise to indemnify. The promise to indemnify is not, in my opinion, as was submitted by counsel for the appellant, of a limited nature: but, of course, in respect of the amount of each claim for loss or damage, the amount payable in respect of the loss or damage must be diminished by the appropriate deductible amount. (at p215)

23. The proper use of the provision as to deductibles is, first, to determine the amount of claim, that is to say, determine the amount of loss or damage from an insured cause and thereafter apply the

deductibles provision by reducing the total amount of the claim by the appropriate amount deductible. (at p216)

24. Some discussion took place in argument as to the function of Memo 2 in the indorsement on the policy, viz. 'Basis of Loss Settlement'. In my opinion, this memo effects an extrapolation of the promise to indemnify. That promise, aided by the memo, is a promise to pay the whole cost of the repairs necessary to restore the property to its condition immediately before the occurrence of the damage, provided that the cost of reparation does not exceed the value of the property at the time of the damage to that property, in which event that value determines the amount of the loss. That is to say, providing there is not a total or a constructive total loss of the property, the cost of its restoration to its pre-damaged condition is payable by the appellant: the respondent for its part being bound under the memo to repair the embankment to its pre-damaged condition. (at p216)

25. In relation to the embankment, the possibility of a constructive total loss would seem to be remote but perhaps it could not be entirely ruled out. The question of placing a value on the embankment in the course of construction at any particular time would at best offer considerable difficulty. In any case, no question of a constructive total loss arises in this case. The respondent was bound to effect the repair. The appellant became and remained liable to pay the cost of the repair of the damage done to the embankment by each of the storms, that of February 1974 and that of May 1974: the question in the case, in my opinion, is what was the cost of that repair. (at p216)

26. It is convenient at this point to dispose of a submission which was made in argument and which was built upon the circumstance that Memo 2 contemplated that constructive total loss could be declared before the work of repair had in fact been completed or perhaps even undertaken. It was submitted that the obligation of the appellant under the policy was only to pay the estimated cost of repair of the damage, the estimate being made at the time of the occurrence and according to costs applicable at that time. It was said that, in order to make the constructive total loss provision work, it must be necessary to compare an estimated cost of repair with the value of the property which has been damaged: and therefore that that estimate of the cost of repair was the real measure of the liability of the insurer. (at p216)

27. In my opinion, this submission is quite unacceptable. For one thing, the estimate could not in any case be tied to a cost level appropriate to the date of the occurrence; for the length of time to be occupied in repair must be a factor in making any such estimate: and the hazards of the sea could not be ignored as they may affect that cost during the period necessary to effect the repair. Therefore, alterations in the level of cost over that period would have to be taken into account. But, more fundamentally, it is quite clear from the memo that the mutual obligation of the parties is that repairs shall be effected and that progress payments will be payable during the course of the work of repair: see Memo 2. If the appellant wished to confine the claim to what would be appropriate in the case of constructive total loss it would rest upon the appellant to demonstrate that, of necessity, the cost of reparation must exceed the value of the property in its pre-damaged condition. But that cannot mean that the appellant's obligation is limited to paying the estimated cost of repairing the damage and, in particular, to the cost of such repair at cost levels appropriate to the date of the receipt of the damage, i.e. as if the repair were totally effected on that date. In my opinion, the obligation of the appellant was to reimburse the respondent the full cost of repairing the damage done by each of the February and May storms so as to restore the property to the state it was in immediately prior to the occurrence of that damage. (at p217)

28. Perhaps it is also convenient at this stage to notice another submission which was made during

argument. It was said on behalf of the respondent that the expression "or make good" in the insurer's promise provided the appellant with an option itself to undertake the work of reparation. In order to do so, it would be found, so it was said, to reinstate the property to its condition before the receipt of the damage, whatever impediments to effecting such work might occur in the course of carrying it out. For my part, I derive no assistance in the determination of the questions arising in this appeal from the presence of the words "or make good" in the insurer's promise. But, in any case, I do not think that the appellant, because of the form of the promise to indemnify, did have an option to reinstate the embankment by itself effecting the requisite repairs. The total expression "pay or make good" means no more than that the appellant will pay the full cost of reinstating the embankment to its pre-damaged condition. The respondent's obligation to repair was express. Only proof that the cost of repair would necessarily exceed the value of the undamaged property would displace or qualify that obligation. (at p217)

29. Once an obligation to perform a promise has attached, only release or performance will discharge the obligation. Here the obligation is to pay money, the amount payable to be determined by the amount necessarily spent in returning the embankment to its pre-damaged condition. No question arises in this case as to impossibility of performance as an excuse for non-performance. There is no room for an accord and satisfaction. There is no question of release. Performance of the promise involved the payment of the cost of repairing the damage done by the storms, i.e. damage done to an undamaged portion of the embankment. There is no question that the appellant did become liable to the respondent for the cost of repairing the damage done to the embankment by the storms. As I have said, the question in the arbitration was what was the cost of doing so. (at p218)

30. Unquestionably, the damaged embankment could not have been restored to its former condition without replacing parts of the damaged embankment which were affected during the episodes. (at p218)

31. The appellant objects to paying so much of the cost of restoring the embankment as was referable to the intervening episodes. It says that, because of the relationship of the cost of making good the particular damage done on the occasions of such episodes to the deductible amount under Section 1 of the policy, it has no liability in respect of the cost of reparation of that particular damage. (at p218)

32. In the case of an insurer's promise to indemnify for damage to property, once the circumstances call for its performance by the payment of money, the insurer will be bound to perform and cannot, in my opinion, excuse himself because the costs of his indemnity are greater as the result of some intervening event against which the insured was not insured but which in fact increased the cost of reparation of the property to the pre-damaged condition. (at p218)

33. It was submitted in this case in substance that the appellant was not liable for the cost of repair to the extent that that cost was due to a risk which was an excluded or non-included risk. I have already indicated that the deductibles did not constitute exclusions from the risks insured against. Nor can it be said, in my opinion, that the impediment to the repair of the embankment which these episodes effected did not require to be overcome as part of the process of restoring the embankment to its pre-damaged condition. The insurer, in my opinion, cannot avoid its obligation to pay the cost of repair because that cost is increased by intervening events not due to acts of the insured. Although not a factor in the formation of my opinion, it is worth observing that in the repair of an embankment of this kind, the rock of which it is formed not being held together by other than gravitational forces, the action of the sea, unpredictable and oft-times violent, must inevitably affect

the work of reparation to a greater or less extent. An unqualified contract to repair the damaged embankment would require the contractor to repair to the agreed extent whether or not that repair became more costly because of the action of the sea during the period of repair. So here, the promise to pay the cost of the repair having attached because of the occurrence of the damage to the undamaged embankment by the storms, it must be performed notwithstanding that the action of the sea increased that cost. (at p219)

34. It was said in argument that the damage occurring during the episodes was caused by an uninsured risk. However, as I have already pointed out, the provision as to deductibles did not effect an exclusion of a cause of damage. But, in any case, if the obligation to pay the cost of repair has attached, it is nothing to the point that the necessary cost of repair is increased by some event which is not an insured risk. (at p219)

35. Suppose an insurer against damage by fire has become bound to reinstate the damaged property, a fire having damaged the property during the currency of the policy. Suppose the term of the policy expires whilst the promise to reinstate is still not fully performed. Then suppose some event to occur which renders the reinstatement more costly, i.e. to occur after the term of the policy has expired and before the reinstatement to the pre-damaged condition is complete. None the less, in my opinion, the insurer would be bound to reinstate. It would be no answer for him to say that the added cost was due to an uninsured risk. The true analysis is that the obligation to reinstate having attached during the currency of the policy, its performance is required whatever it costs and however the cost is increased by events which could not in themselves have given rise to a claim under the policy. (at p219)

36. The decision of the Supreme Court of Victoria in Smith v. Colonial Mutual Fire Insurance Co. Ltd. (1880) 6 VLR 200 (which, in my opinion, was correctly decided) is illustrative of this principle. (at p219)

37. Another illustration can be seen in the effect an industrial stoppage may have on the cost of repair. Suppose when the repair is part done an industrial dispute causes the work of repair to be suspended for a considerable time. Suppose that on resumption of the work of repair costs have increased dramatically. It would, in my opinion, be nothing to the point that the industrial stoppage was not an insured event. The only question would remain as it does in this case: what did it cost to restore the embankment to its pre-damaged condition; that is to say what in the prevailing circumstances did it necessarily cost to restore the embankment. (at p219)

38. Here, the appellant has promised that, the damage being reparable, the cost of restoring it to its pre-damaged state will be paid to the respondent, the respondent being obliged to repair to that extent. It seems to me nothing to the point that the cost of that repair was increased by events which in themselves may or may not have formed insurable risks or risk in respect of which, if they themselves formed the basis of a claim, would not have involved the appellant in financial obligation. Thus, in the present case, once the damage had been done to the embankment by the February storm, the obligation to pay the cost of its reparation attached and could only be satisfied by payment of the cost of that reparation. Nothing in the policy limited the appellant's obligation in point of amount except the scheduled total overall insured sum and, of course, the relevant amount deductible in respect of the damage done by each of the February and May storms. Until the embankment had been restored to its pre-storm position, no new claim under the policy in respect of the repair of the embankment arose. It seems to me immaterial that the episodes of March, April and May 1974 would have formed the basis of separate claims had they occurred when the embankment

was undamaged. As I view the matter, they were merely incidents which increased the costs of reparation or, in other words, the cost of the performance by the appellant of a promise which was already called for. The same is true of the incidents between May 1974 and February 1976 in relation to the damage done by the May storm and the effect of the eight subsequent episodes. (at p220)

39. The further injury to the damaged embankment within the area of the damage and an injury to a hitherto undamaged portion of the embankment is illustrated by the treatment of the amount of $25,000 by the arbitrator. The $25,000 was not expended in repairing the damage to the embankment by the earlier storm but to repair an injury to a theretofore undamaged part of the embankment. (at p220)

40. The arbitrator found as a fact the respective amounts spent between February 1974 and May 1974 and between May 1974 and February 1976 were costs of the repair respectively of the February and May storm damage. That they were also costs of repairing the damage done by the intervening episodes does not impair his finding as to the cost of the repair of the damage done by the February and May storms respectively. (at p220)

41. Some comfort was sought to be obtained by the appellant's counsel from cl. 2 of the 'Endorsements' to the policy. It was claimed that the clause indicated the importance of treating each episode as itself a source of claim and therefore each attractive of the deductible provision of the policy. It may be granted that each occasion of damage to an undamaged portion of the embankment would give rise to a separate claim and would attract the provisions as to deductibles. But that does not lead, in my opinion, to the conclusion that any damage to the already damaged embankment making the work of repairing the damage which had already occurred more costly ought to be treated as disparate from the costs of repair of that damage and as a separate claim under the policy. In my opinion, this is not so. The respondent would have the benefit of the clause in respect of an incident damaging an undamaged portion of the embankment. But the clause has no bearing on an incident which in causing damage to a part of the embankment under repair increases the cost of reparation. (at p221)

42. The respondent put forward before the arbitrator and before the Court of Appeal and this Court an alternative argument under which the damage caused by the several episodes between the major storms was treated as a source of claim of which the proximate cause was the antecedent storm. I think this submission mis-conceived. If it be conceded that the damage done by one of the intervening episodes to the already damaged embankment was itself a source of claim, the proximate cause of that damage was the condition of the sea prevailing at the time of the episode. I do not see how, by any stretch, the antecedent storm could be regarded as a proximate cause of the damage done by the episode if it is to be regarded as itself an independent source of claim. In my opinion, the respondent had no need of any such alternative support for its claim to recover the whole cost of the repair of the embankment to its pre-storm damaged condition. (at p221)

43. However, this alternative argument led the arbitrator to attempt what seems to me a somewhat difficult exercise but which, according to his findings, he seems to have been able to perform. He found that some stated proportion of the damage done at the time of the particular episodes was due to the condition of the damaged embankment and the residue of it presumably was damage which might well have occurred to an undamaged embankment in the then prevailing conditions. It seems to me these findings were irrelevant. It cannot matter, in my opinion, that the cost of repair which was in fact incurred would in part have been incurred had there been no antecedent damage to the

embankment when the episodes took place. (at p221)

44. As I have pointed out, the arbitrator found that all the costs of repairing the wall, including those costs which owed their immediate origin to the episodes, were costs of reinstating the embankment to its pre-storm situation. That finding of fact is, in my opinion, sufficient to dispose of the appeal. Nothing in the reasons of the primary judge in any way tainted that finding of fact or made it erroneous on its face in point of law. Whether the cost of making good what was done by the episodes was part of the cost of restoring the wall to its undamaged condition is, in my opinion, itself a question of fact, even though questions of fact may often appear to involve legal conclusions or the application of legal principles. But, as the matter has been more elaborately argued, I have dealt with the various submissions on the assumption that to decide that the added cost of repair due to the episodic damage to the embankment under repair involves a decision on a matter of law. (at p222)

45. In my opinion, the appeal should be dismissed in relation to the claims for cost of repair of the embankment; that is to say, that the respondent was entitled to the whole cost of reinstatement of the wall after each of the two storms, that of February and that of May, which did damage to a then undamaged embankment. (at p222)

46. Three other items included by the arbitrator in his award of the cost of restoring the embankment to its pre-storm damage were challenged by the appellant, namely: (1) stockpiling of rock; (2) financing charges; (3) lost rock. (at p222)

47. These were all found to have been in fact part of the costs of repair. In my opinion, no error of law appears on the fact of the award in relation to any of these items. (at p222)

48. There remains the question whether the arbitrator had power to award interest on the amount which he held the appellant was obliged to pay to the respondent under the policy of insurance. The Court of Appeal has followed the decision of the English Court of Appeal in Chandris v. Isbrandtsen-Moller Co. Inc. (1951) 1 KB 240 and has treated the power of the arbitrator to award interest as being derived from the implied acceptance of the parties that the arbitrator should be able to decide the matter between them according to the law of the land. But, with due respect, I am unable to accept this analysis. (at p222)

49. The question whether the arbitrator has power or authority to award interest on the sum awarded is a matter of procedure to be resolved by procedural law. It is not a matter of substantive law. Quite clearly, in the law of contract there is no right to the payment of interest where there is no promise to pay it. But in point of procedure the payment of interest on moneys due and payable could be ordered by courts. The occasions when a court at common law could order the payment of interest, not promised to be paid, were few. They are set out in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. (1893) AC 429 ; and cf. Halsbury's Laws of England, 4th ed., vol. 12, par. 1179. (at p222)

50. Thus, in cases not within those categories, no tribunal at common law could order the payment of interest by way of damages for non-payment of a sum due and payable. (at p222)

51. In those cases authority to order interest to be paid must be conferred by the legislature, which it has from time to time done. However, where the legislature has intervened to enable interest to be ordered to be paid it has done so by empowering a specified tribunal or class of tribunal to make the

order: that is to say, it has provided a procedure whereby interest which has not been promised to be paid and is outside the common law categories may be ordered to be paid. Thus, the Civil Procedure Act 1833 (3 & 4 Wm. IV c. 42) allowed the jury as the chosen tribunal to award interest in a limited range of cases. Again, the Law Reform (Miscellaneous Provisions) Act 1934 (U.K.) selected courts of record in which to repose the statutory power to award interest in cases not falling within the common law categories. But the repeal of the Act of 1833 withdrew that authority from juries. (at p223)

52. After those legislative provisions the relevant "law of the land" was, in my opinion, that between 1833 and 1934 a jury might award interest by way of damages and that after 1934 a court of record might do so. (at p223)

53. But such legislation, in my opinion, cannot be converted by judicial decision into the grant of power to all tribunals to award such interest. The circumstance that a judge might sit alone to decide questions of fact would not, in my opinion, warrant the conclusion that by reason of that circumstance alone a judge might exercise the statutory power of awarding interest reposed in the jury. In my opinion, the reasoning of the Court of Appeal in Chandris' Case along that line is unacceptable. (at p223)

54. More recently the legislature of the United Kingdom has conferred such a power on arbitrators: see Arbitration Act 1950 (14 Geo. 6 c. 27 s. 20). No comparable legislation has been passed in New South Wales, though by the Supreme Court Act, 1970 (N.S.W.), the Supreme Court has been given the power to award such interest (cf. s. 94). The question whether there should be procedural authority to award interest is very much a matter for the legislature and not for the judiciary. Doubtless it would be convenient and conducive to the added use of arbitration for arbitrators to have the power to award such interest. It may be highly convenient and just for a tribunal to make an order for the payment of a sum of money to compensate the plaintiff for the delay in its payment by ordering the payment of interest. This is particularly so in the case of insurance claims where the insurer has the profitable commercial use of the money which, though due to the insured, has not been duly paid. The legislature might well take the matter in hand as the legislature in the United Kingdom has done. (at p223)

55. But, in my opinion, the courts are not warranted in deciding that, because the legislature has given to some courts the power to award such interest, the power should be treated as given to all tribunals able to settle disputes as to money claims. It is, in my opinion, an unacceptable line of reasoning to conclude that because the parties to the arbitration must be taken to have agreed that the differences between them shall be resolved according to the law of the land, the arbitrator has the power to award interest. The relevant law of the land can rise no higher than the statement that some specified tribunals can award such interest. The law of the land is that some, but not all, tribunals may do so. (at p224)

56. In my opinion, an arbitrator under a consensual submission has no statutory authority to award interest not promised to be paid, the case not otherwise falling under the common law categories. (at p224)

57. Then it is said that the power is derived by implication from the terms of the reference. In this case, there is nothing in those terms in this case on which, in my opinion, any such implication can be specifically based. So it is said in substance that there should be implied in every consensual reference an authority to the arbitrator to award interest on any sum he shall find to have been due.

This is said to be so because the agreement of the parties is that the arbitrator shall decide the matter before him according to the law of the land. So much, I think, may be granted. But the next step which the submission takes is, in my opinion, unwarranted. It is said that the power or authority to award interest is part of the law of the land within this mutual concession. But, as I have already indicated, the relevant law - the procedural law - is that specified tribunals have such authority. I am unable to accept the submission that it is an implied term of a consensual reference that the arbitrator has authority to award interest in cases falling outside the common law categories. (at p224)

58. I might add that the reference in this case, found in the "General Conditions" of the policy, was confined to differences arising under the policy. The question whether the arbitrator should have power to award interest does not appear to me to be a possible difference arising under the policy. (at p224)

59. I turn now to the case law dealing with the question of an arbitrator's power to award interest. I am relieved of any need to detail and discuss the relevant authorities as this has been recently and thoroughly done by the Full Court of the Supreme Court of Victoria in Robert Salzer Constructions Pty. Ltd. v. Barlin-Scott Air Conditioning Pty. Ltd. (1980) VR 545 . Their Honours (Young C.J., McInerney and Fullagar JJ.) concluded that an arbitrator in Victoria has no power to award such interest. They were not prepared to follow the decision of the Court of Appeal of the United Kingdom in Chandris' Case which was founded on Edwards v. Great Western Railway Co. [1851] EngR 881[1851] EngR 881; ; (1851) 11 CB 588 (138 ER 603) . (at p225)

60. I am in agreement with the Victorian Supreme Court's analysis of the common law and of the cases of Edwards and Chandris. In my opinion, the result in Edwards' Case in relation to the award of interest must be placed upon the circumstance that the arbitrator in that case was authorised to determine in lieu of the jury the amount of the verdict in the action which could properly include interest on the sum found to be due. I prefer the reasoning of the Divisional Court in Podar Trading Co. Bombay v. Francois Tagher, Barcelona (1949) 2 KB 277 to the reasoning of the Court of Appeal in Chandris' Case (1951) 1 KB 240 . I find the reasoning of the Supreme Court of Victoria convincing. The relevant parts of the various judgments are set out in that Court's reasons for judgment. (at p225)

61. Chandris' Case has stood for years without, so far as I can see, any attempt to carry a case to the House of Lords to attempt to overturn it. But the Arbitration Act 1934 (24 & 25 Geo. 5 c. 14) had already been amended to include a power to award interest at the time of the decision of Chandris' Case. There is thus little significance in the fact that the decision of the Court of Appeal has not been challenged. (at p225)

62. Whether that case has been acted upon in the Australian States does not appear, though in the Australian Commentary on Halsbury, it is said that an arbitrator in Australia does not have the power to award interest: par. C580 of vol. A of the Australian and New Zealand Commentary on the 4th edition of Halsbury's Laws of England. (at p225)

63. It seems to me that, although the possession by an arbitrator of such a power has obvious advantages, this Court ought to adhere to legal principle and not attempt, or condone an attempt by the courts, to usurp a function of the legislature. In my opinion, the better, and indeed the only, course is to adhere to the law as the Court sees it, leaving it to the legislature to provide the necessary authority to arbitrators. (at p225)

64. Accordingly, I am of opinion that the arbitrator in this case had no authority, statutory or consensual, to award interest on the amount found by him to be due by the appellant under the policy of insurance. The error of law in this respect clearly appears on the face of the award. Being of that opinion there is no need for me to examine the question whether the circumstances of the case woudl have brought it within the requirement of the Supreme Court Act 1970 (N.S.W.), or the Common Law Procedure Act, 1899 (N.S.W.), i.e. if the arbitrator's authority was sought to be derived from the powers given by either of these Acts. (at p226)

65. Nor need I consider, having regard to the terms of par. (b) of Memo 2 of the policy, from what date interest ought, in any case, to have been calculated. (at p226)

66. In my opinion, the award of the arbitrator in so far as interest was awarded should be set aside but the appeal otherwise dismissed. (at p226)

STEPHEN J. When Atkinson-Leighton Joint Venture began to build a great embankment out into Botany Bay, in the shelter of which the work of reclaiming land from the sea was to proceed, it insured with the Government Insurance Office of New South Wales against damage to the works. (at p226)

2. The exposed position in which the embankment was to be built involved the risk of damage from high seas in the Bay. The Contractors' All Risk Policy (Excluding Fire) issued by the G.I.O. indemnified the Joint Venture against unforeseen loss or damage suffered to the embankment and necessitating repair or replacement. (at p226)

3. The building of the embankment began in 1971 and continued on into 1976. During construction the embankment suffered severe damage in 1974 from two violent storms, first in February and then again in May. Other less violent storms also occurred in 1974 and 1975 and they too caused damage. Details of these events appear in other judgments. (at p226)

4. A feature of the policy issued by G.I.O. was its provision for "deductibles", amounts to be borne by the insured, the Joint Venture, "in respect of each and every occurrence arising out of" certain events. These events included storm, tempest and loss or damage by water: in the case of damage arising out of such events the insured was to bear "the first $100,000". (at p226)

5. Because the embankment, while under construction, suffered storm damage on numerous occasions in 1974 and 1975, any interpretation of the policy which results in the deductibles clause being applied as seldom as possible to claims made throughout that period will be in the interests of the Joint Venture: contrariwise in the case of the insurer, G.I.O. In the present proceedings, whose course to date is described in the judgment of Mason J., the opposing submissions reflect accurately enough the opposing interests of the parties. (at p226)

6. That an insured should himself bear a specified part of each loss is a familiar feature of insurance policies, no doubt designed to encourage the insured to guard against the happening of events giving rise to claims for indemnity. When a number of claims to indemnity under the one policy is made over a limited period problems may arise concerning the operation of the deductibles clause, in particular whether it applies to each such claim or to some only of them. In the present case problems arise because some of the successive storms which damaged the embankment in the course of its construction occurred in relatively quick succession, so that damage caused by one storm was not wholly made good before another storm caused further damage. Moreover, the extent

of the further damage to the embankment was affected by it being in an already damaged condition. The policy's deductibles clause operates in a straightforward enough way when particular damage can be unequivocally associated with a particular storm and no other. Its operation may be thought to be less certain in the circumstances which in fact occurred. (at p227)

7. To state, as concisely as possible, the rival contentions will best expose the problem. The G.I.O's primary contention is simple in the extreme: it is that damage arising from each storm is a separate occurrence and that, since each occurrence attracts the deductibles clause, the Joint Venture must bear the first $100,000 of damage occasioned by each storm. The Joint Venture's opposing contention is scarcely less straightforward. It says that the nature of the indemnity afforded by the policy makes the G.I.O. liable for the entire cost (subject only to the "deductible" of $100,000) of restoring the embankment once it has suffered damage as a result of a storm. Accordingly, if, while the repairs rendered necessary by initial storm damage are being carried out, further damage is suffered, its only effect will be to make the original work of repair more expensive. Only in that sense will the damage from a second storm render more onerous the G.I.O.'s liability under its promise to indemnify: that damage will not provide the occasion either for a fresh claim by the insured under the policy or for a fresh invocation of the deductibles clause by the insurer. A consequence of the G.I.O.'s contention must be that only when the embankment has been restored to the condition it enjoyed before the first storm can the deductibles clause begin to operate once more. (at p227)

8. Each party also has a second string to its bow; these happen to be identical in character, although perhaps differing somewhat in outcome. Each submits in the alternative, if its primary submission be rejected, that, if damage following each storm constitutes a separate occurrence to which the deductibles clause will apply, the application of that clause will each time be confined to the damage caused by that particular storm and will not extend to damage having as its proximate cause some earlier storm. I defer for the time being any examination of this submission and of its possible outcomes. (at p228)

9. To resolve the conflict between the primary submissions of the parties requires an initial appreciation of the general character of this policy, followed by an examination of its terms. The policy, although containing a number of standard clauses, was, clearly enough, especially designed to meet the needs of this particular project. The project involved major engineering works of an unusual character, the construction for a public authority of a long embankment projecting in an arc into Botany Bay. The policy contemplates a lengthy period of cover, over two and a half years, with provision for extensions of time which, in the outcome, had to be liberally availed of. It recognizes that the insured is a contractor, the property insured being the embankment which the insured had contracted to construct. It restricts the insurer's liability in two ways, by reference to sums insured, fixed in the case of the works at almost $32 million, and by the much debated deductibles clause, the operation of which is somewhat modified in favour of the insured by two "defined period" clauses. (at p228)

10. There was, then, to be a long-continuing period of cover, during the course of which claims to indemnity might arise. As the terms of the deductibles clause reveal, and as would be expected from the nature of the project, the policy is much concerned with storm-damage, not, of course, confined to the risk of only one damaging storm: the policy contemplates that during its construction parts of the embankment may from time to time be damaged by storms and that the deductibles clause should apply when this occurs. I will come later to the significance of other aspects of what I have called the general character of the policy. (at p228)

11. From the foregoing general characteristics of the policy I would expect that by its terms it would both afford to the Joint Venture continuous indemnity throughout the period of cover and at the same time continuously restrict the amount of indemnity in the manner contemplated by the deductibles clause. Continuous cover without continuous restriction, which is what the Joint Venture's submission involves, would largely deprive the G.I.O. of the protection of the deductibles clause, which would no longer be fully effective as an incentive to the Joint Venture to carry out the work of construction in such a way as to minimize the risk of storm damage. (at p228)

12. Examination of the policy confirms that it in fact operates as might be expected. The relevant part of the detailed promise to indemnify provides:
"if at any time during the period of insurance stated in the Schedule, or during any further period of extension thereof, the property or any part thereof described in the Schedule shall suffer any unforeseen loss or damage from any cause other than those specifically excluded, in a manner necessitating repair or replacement, the Office will pay or make good all such loss or damage. . ."
The first of the exclusions to which that clause refers provides:

> "The Office shall not, however, be liable for:
> (a) the deductibles stated in the Schedule to be borne by the Insured in

any one occurrence other than lightning or explosion;"
The scheduled deductibles are expressed as follows:
"Amounts to be borne by the Insured in respect of each and every occurrence arising out of
(a) earthquake, storm, tempest, hurricane, cyclone, flood, inundation, subsidence, landslide, collapse or loss or damage by water the first $100,000

(b) any other cause, except lightning
and explosion the first $5,000" (at

p229)

13. These extracts disclose that the detailed promise to indemnify contains, as an integral part of the indemnity, the exclusion of specific causes of loss or damage. The drafting leaves something to be desired: to describe exclusion (a), which refers to the scheduled deductibles, as an excluded cause of loss or damage is an obvious misuse of language. But the intention is clear enough, the promise to indemnify is to be qualified by the operation of the deductibles clause and that qualification attaches throughout the entire period of the indemnity. Exclusion (a) ensures that the deductibles clause will come into operation upon the happening of "any one occurrence". Then, the deductibles clause itself provides that "the first $100,000" is to be "borne by the Insured in respect of each and every occurrence arising out of" storm, tempest or other specified causes. The language is explicit; it involves no diminution of the continuous cover which the policy affords but it does ensure that, whenever the cover afforded by the promise of indemnity is availed of, the deductibles clause will also apply; "each and every occurrence" of loss or damage will give rise both to an entitlement to be indemnified and to an application of the deductibles clause. (at p229)

14. The "occurrences" of which the deductibles clause speaks must, I think, refer to the happening of loss or damage; they are expressed as "arising out of" any of the events described in pars. (a) or (b) of that clause, events such as an earthquake, a storm or "any other cause". An occurrence will therefore not be the casual event itself but, rather, the consequential loss or damage which follows

upon such an event. (at p230)

15. It is upon the happening of every such "occurrence" that the deductibles clause operates and the plain language of the policy seems to me to require that the happening of a second damage-causing storm after an earlier such storm should bring the deductibles clause into operation for a second time. (at p230)

16. There are other provisions of the policy which, I think, demonstrate this to be its operation. These are the two "defined period" clauses, already mentioned in passing and which appear in the policy as clauses 2 and 3 under the heading "Endorsements". Clause 2 permits the insured to select "defined periods" of limited duration, within which loss or damage which is suffered and is caused by "storm, tempest, flood or loss or damage by water" is to be deemed "to have been suffered in the one occurrence" for the purpose of "deductibles". Clause 3 performs a somewhat similar function in the case of loss or damage by earthquake. The written submissions of counsel for the G.I.O. appear to me accurately to state the effect of these two clauses. They "limit the exposure of the insured to the operation of the deductibles provision, so that with respect to all damage occurring within a 'defined period' the insurer is entitled to only one deduction". They do more than this: as the submission puts it:
"The corollary of the contractual stipulation (Endorsements 2 and 3) that in certain circumstances a number of occurrences may be notionally coalesced into one occurrence for the purpose of limiting the operation of the 'Deductibles' clause is that in cases which do not attract the operation of one or other of the endorsements, that clause applies with full force so as to reduce the quantum of the indemnity payable with respect to each separate occurrence which falls within one or other of the several descriptions of occurrence set out in it." (at p230)

17. Counsel for the Joint Venture urges a quite contrary view of the policy, one which lays particular stress upon two of its features, the first being the terms of a clause, Memo 2, bearing the sub-heading "Basis of Loss Settlement". That clause appears in full in other judgments. Its sub-heading accurately describes its contents; it prescribes as the basis of loss settlement the cost of restoration to pre-damage condition, except in the case of a total loss, in which case pre-loss value is to be adopted. If the cost of repair exceeds the pre-loss value, settlement is to be on the basis of a total loss. (at p230)

18. In itself this clause seems wholly neutral in effect. But it is said to support the Joint Venture's case because it contemplates that the insurer shall pay, by progress payments, the actual cost of repairs, as and when carried out, and not their estimated cost. This, it is said, is consistent only with the view that, once the embankment is damaged by a storm, the insurer's obligation to indemnify will only be satisfied when the actual costs of reinstatement, as and when incurred, have been paid by the insurer, regardless of whether they have been inflated in total by the sustaining by the embankment of further damage from further storms while still undergoing repairs. (at p231)

19. With the terms of Memo 2 the Joint Venture would couple the policy's reference to the making good of loss or damage, appearing in the detailed promise to indemnify. This is said to support the view that the insurer's obligation to indemnify, arising from the suffering of particular damage, continues until damage is wholly made good, regardless of the happening of intervening storms which cause further damage and make the work of reinstatement more expensive. (at p231)

20. The Joint Venture's reliance upon the policy's reference to the making good of loss or damage by

the G.I.O. provides, in my view, a quite inadequate basis upon which to gound the interpretation which it urges. Nor is that inadequacy made good by the reliance which is also placed upon Memo 2. (at p231)

21. Despite its reference to "making good", the policy cannot, I think, be read as entitling the G.I.O. to elect itself to reinstate the embankment as an alternative to paying the cost incurred by the Joint Venture in repairing it. This was, after all, a Contractors' All Risk Policy and what was being insured was a major engineering project, being constructed by the insured for the Maritime Services Board. As appears in pars. 46 to 48 of the Arbitrator's Special Case, with which these proceedings originated, the insured was obliged to carry out all construction and repairs under the detailed supervision of the Board's inspectors: changed methods of construction would require the approval of the Board. It would, of course, be extraordinary were such provisions not imposed upon the Joint Venture in its carrying out of a project of this nature, undertaken for a public authority. It follows that neither the insurer nor the insured can for a moment have regarded it as appropriate that the insurer should have, let alone seek to exercise, a right to engage its own contractors and sub-contractors to reinstate damaged portions of the embankment. Hence, no doubt, the absence of any common form clause providing for an election by the insurer to reinstate and for the detailed regulation of exercise of that right. (at p231)

22. If the inclusion of the words "or make good" in the insurer's promise to "pay or make good all such loss or damage" were thought to give it a general right to undertake reinstatement of the embankment this could, I think, only be attributed to the parties' oversight. However I do not regard it as having that effect. The G.I.O. suggests that the words may have some limited application, as in the case of the loss of insured plant or equipment. Maybe they have; at all events the general conditions of the policy, which can be seen to be specially adapted to suit a policy indemnifying contractors, contain provisions wholly inconsistent with any right of the insurer to undertake reinstatement of damaged construction work. For example, included in those general conditions is an express right of the insured itself to proceed with necessary repairs or replacement, qualified only by reference to the insurer having an opportunity to first inspect the extent of loss or damage. Again, Memo 2 of the policy itself goes a long way towards negating any right in the insurer to elect to reinstate rather than pay the cost of repairs: it contemplates only two bases of settlement, payment of the cost of repair in the case of partial loss and payment of the pre-damage value in the case of total loss. (at p232)

23. It follows that such reliance as the Joint Venture places upon reinstatement cases such as Smith v. Colonial Mutual Fire Insurance Co. Ltd. (1880) 6 VLR 200 and upon passages in modern texts on insurance law which cite this case as authority is misconceived. Smith's Case turned upon the fact that the fire insurer had elected to reinstate the insured's fire-damaged house. It was accordingly entitled to no credit in its favour for the cost of its own work of reinstatement, which had been destroyed when the house was itself destroyed in a second fire, occuring during reinstatement - per Stawell C.J. and Stephen J. (1880) 6 VLR, at pp 202-203 . (at p232)

24. If no question of a right of reinstatement by the insurer arises, the Joint Venture gains no assistance from the policy's reference to "making good" and its view of the construction of the policy must then largely rest upon the terms of Memo 2. It must seek support from the fact that, in the words of Reynolds J.A., speaking for the majority in the Court of Appeal and quoting from part of par. (4) of Memo 2, it contains "a promise to settle the claim by paying 'the cost of repairs necessary to restore the property to its condition immediately before the occurrence of the damage'". However, I am, with respect, unable to read Memo 2 as other than a useful but quite subsidiary

provision of the policy. It seems to me to do no more than differentiate between, on the one hand, the consequences of reparable damage to, and, on the other, of total loss of, the property insured, as well as containing, as its penultimate provision, a constructive total loss provision. In par. (a) it describes, in the words quoted above, the basis of settlement in the case of reparable damage. The "damage" of which it speaks is, of course, such damage as is the subject of the indemnity afforded by the policy, an indemnity which is, and remains throughout the period of the cover, qualified by the deductibles clause. (at p233)

25. It is true that the words of par. (a) do not confine the cost of repairs to those needed to make good a particular "occurrence", but by the same token par. (a) makes no mention whatever of any deductibles. If its words were to be regarded as defining the promise of indemnity the insured might equally well contend that it overrode the whole concept of deductibles and entitled it to the full cost of repairs without any deduction, even in respect of damage suffered in the first storm. However, if Memo 2 is seen as performing only the quite limited functions which I have described, there follows neither this consequence nor that urged by the Joint Venture in support of its general submissions in these proceedings. I reject those submissions and adopt the interpretation of the policy urged on behalf of the G.I.O. (at p233)

26. This conclusion means that in the case of each storm it is necessary to determine the relevant damage which is subject to indemnity and to apply to it the provisions of the deductibles clause. This involves in each case no more than a determination of the pre-storm state of the embankment with its post-storm state so that, in the words of Memo 2, there may be made an assessment of "the cost of repairs necessary to restore the property to its condition immediately before the occurrence of the damage less salvage". It does not involve the construction of any chain of causal links or a determination whether the further damage suffered by the embankment can be attributed in part to its already storm-weakened state. The indemnity afforded by the policy is emphatically unrelated to particular causes. Appropriately enough in the case of an "All Risks" policy, what is to be indemnified against is, in the words of the opening clauses of the policy, "the Contingencies specified in the within Schedule, actually occurring" during the period of cover. This is then enlarged upon in the detailed promise to indemnify, which refers to the suffering of "any unforeseen loss or damage from any cause other than those specifically excluded, in a manner necessitating repair or replacement". (at p233)

27. It is only in relation to exclusions that causes become material, whether in determining the occasions upon which true exclusions from liability become applicable or, in the case of deductibles, in determining whether, when there is any "occurrence" of damage, any and what amount is to be borne by the insured. In the case of deductibles, the enquiry need proceed no further than ascertainment of the happening of damage, since that is the occurrence of which the deductibles clause speaks: that is the damage "arising out of" a storm, in the sense of sequentially following upon and having a storm as its immediate cause, to which the deductibles clause will apply. (at p234)

28. There remains the question of the power of the Arbitrator to award interest upon amounts found by him to have been due to the Joint Venture by the G.I.O. An amount for interest of $224,602 is involved and the G.I.O. contends, contrary to the judgments both at first instance and in the Court of Appeal, that no power exists, the awarding of interest therefore disclosing error of law. (at p234)

29. There exists no express grant of power to award interest either in the submission or in the Arbitration Act 1902. The power to award interest which is conferred by s. 94 of the Supreme Court

Act 1970 is conferred upon "the Court" and in terms which refer to "proceedings" and to "judgment". The learned primary judge held that, in a case such as the present, agreement was to be implied that the arbitrator might award interest upon the same principles as applied to awards of interest by the Supreme Court. His Honour relied upon Chandris v. Isbrandtsen-Moller Co. Inc. (1951) 1 KB 240 and Evans v. National Pool Equipment Pty. Ltd. (1972) 2 NSWLR 410, at p 416 . The G.I.O.'s appeal over this issue was dismissed unanimously by the Court of Appeal; Reynolds J.A., with whom Samuels J.A. agreed, regarded the authorities as establishing that a term is to be implied in the contract that the arbitrator should decide according to the existing law of contract and should exercise every right and discretionary remedy given to a court of law. Mahoney J.A. was of the same view; such a power may, he thought, be implied in every arbitration, including those originating in voluntary submissions. (at p234)

30. These conclusions accord with what is now a well established line of modern authority in England, beginning with the overruling of Podar Trading Co. Ltd., Bombay v. Francois Tagher, Barcelona (1949) 2 KB 277 by the Court of Appeal in Chandris in 1950. Following the Chandris Case in London & Overseas Freighters Ltd. v. Timber Shipping Co. S.A. (1971) 1 QB 268, at p 276 , Edmund Davies L.J. expressed similar views and his Lordship's dissenting judgment was upheld on appeal (1972) AC 1 . Of Lord Morris' judgment on that appeal the latest edition of Russell on Arbitration, 19th ed. (1979), p. 356 observes that "it has been recently recognized in the House of Lords that the power includes a discretion as to the amount of interest". The line of authority also includes the decision in Nea Tyhi Maritime Co. Ltd. of Piraeus v. Compagnie Grainiere S.A. of Zurich (1978) 1 Lloyd's LR 16 and the principle involved in the decision in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. (1981) AC 909 , esp. per Donaldson J. (1981) AC, at pp 920-921 . The leading case in this line of authority is, course, Chandris, which the New South Wales Court of Appeal referred to with approval in Evans v. National Pool Equipment Pty. Ltd. (1972) 2 NSWLR, at p 416 . (at p235)

31. The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable and the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. Subject to certain exceptions, principally related to forms of equitable relief which are of no present relevance and which reflect the private and necessarily evanescent status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction. As Russell on Arbitration, 19th ed., puts it at p. 356, speaking of an arbitrator's power to award interest up to the date of his award, "it was always considered that he had power to do so, by virtue of his implied authority to follow the ordinary rules of law". (at p235)

32. I have described the line of English authority as beginning in 1950 with Chandris. It might, I think, for present purposes be regarded as much longer established, existing in an unbroken line from its origin in 1851 in Edwards v. Great Western Railway Co. [1851] EngR 881; (1851) 11 CB 588 (138 ER 603); (1852) 12 CB 419 (138 ER 969) ; through Podar Trading and Chandris on into the latest cases, and this despite the fact that Podar Trading was overruled by Chandris. In Edwards' Case the Court, without articulation of reasons, treated an arbitrator as empowered to award interest. The Divisional Court in Podar Trading would have taken the same view but for what it regarded as a significant change in statute law in 1934. The Court described Edwards' Case as one in which "the court approved of the allowance of interest by an arbitrator because it was allowable in the circumstances of that case by the provisions of the Civil Procedure Act" of 1833 (1949) 2 KB, at pp

289-290 . Until those provisions were repealed in 1934 "an arbitrator had the same powers as the court with regard to the award of interest, but no greater power" (1949) 2 KB, at p 290 . In an earlier passage (1949) 2 KB, at p 288 , it was said that "there is no doubt that prima facie the duty of an arbitrator is to act in accordance with the law of the land" and, again (1949) 2 KB, at p 289 that before 1934 "there is no case which holds that arbitrators are in any different position to the courts so far as awarding interest is concerned". (at p236)

33. I do not regard the members of the Divisional Court as having failed to appreciate that it was only upon "the jury on the trial of any issue" that the Act of 1833 conferred power to award interest and that, accordingly, the like power of arbitrators did not stem directly from that Act but from what, in Chandris, Cohen L.J. described (1951) 1 KB, at p 264 , as "the rule that arbitrators had the powers of the appropriate court in the matter of awarding interest". In Chandris, Tucker L.J. thought the Divisional Court had fallen into this error, but the judgments of Cohen and Asquith L.JJ. do not, as I read them, necessarily adopt that view. The point upon which Chandris departed from Podar Trading, resulting in the overruling of the latter, was one of no relevance to the present case. It turned only upon what effect was to be given to the legislative changes made in the United Kingdom in 1934, when both a new Arbitration Act and the Law Reform (Miscellaneous Provisions) Act of that year were enacted. It is for these reasons that I think that the line of authority may be seen as extending back to 1851. (at p236)

34. In neither Podar Trading nor Chandris, nor, for that matter, in any subsequent English case, has it been suggested that the decision in Edwards' Case turned upon the particular nature of the arbitration there involved. Only in the Victorian Full Court in Robert Salzer Constructions Pty. Ltd. v. Barlin-Scott Air Conditioning Pty. Ltd. (1980) VR 545 has a contrary view been taken. In a carefully reasoned decision, in which, however, no reference is made either to the English authorities which have followed Chandris or to the New South Wales case of Evans v. National Pool Equipment Pty. Ltd. (1972) 2 NSWLR 410 , the Full Court concluded that the decision of the Court of Appeal proceeded upon a misunderstanding of Edwards' Case. Their Honours regarded themselves as faced with a choice between "purity of legal theory, with resultant disconformity with the view now accepted in England" or conformity with Chandris, despite what they regarded as its want of accord with common law principles. They chose the former. The Court's view involves two steps; first that of characterizing the arbitrator in Edwards' Case as "in effect, a special referee, to whom was deputed the duty of acting in the place of the jury" and being for that reason "clothed, by virtue of the order of the court, with the powers of the jury", and, secondly, of narrowly confining to such an arbitrator the power to accord interest. (at p237)

35. Whether their view or that of the members of the Court of Appeal in Chandris is to be preferred turns upon what is the correct view of Edwards' Case and of what it decided. I would not, for myself, have understood the conclusion involved in the Full Court's first step as clearly emerging from a reading of the reports of Edwards' Case. The duties of the arbitrator were to settle the special case and, if the Court subsequently found for the plaintiffs, to determine the amount for which the verdict should be entered. As the plaintiffs claimed interest, the arbitrator included in the special case the question "whether, in addition to any other sum or sums recoverable in this action, the plaintiffs are entitled to recover interest thereon, if the arbitrator shall think the case a proper one for giving interest" [1851] EngR 881; (1851) 11 CB 588, at p 638 [1851] EngR 881; (138 ER 603, at p 625) . In reply, the Court held that "the arbitrator might, if he thought fit, under the submission of 'all matters in difference', award the plaintiffs interest" [1852] EngR 637; (1852) 12 CB 419, at p 422 (138 ER 969, at p 971) . The Court did not draw any analogy between the role of the jury and that of the arbitrator; instead it was the terms of the submission which necessarily conferred on the

arbitrator the power to award interest. The authority of Edwards' Case has not been regarded in the later cases, including Podar Trading, as confined to any particular species of arbitration. On the contrary, the rule has always been expressed in terms embracing all arbitrations, without distinction. It is precisely that view which underlies the decision of the New South Wales Court of Appeal in the present case. (at p237)

36. In those circumstances I would affirm the views expressed by the New South Wales Court of Appeal concerning arbitrators' powers regarding the award of interest. Not only is it in conformity with the great weight of authority; that authority appears to me to involve no error of principle. Moreover it is wholly beneficial in its operation, conferring, as it does, upon arbitrators power to do justice as between parties to a submission by enabling them to award interest, up to the date of the award, upon amounts found due. This is a power the need for which is the greater in times of dear money, reflected in prevailing high rates of interest - The Myron (1970) 1 QB 527, at p 536 . (at p237)

37. I would allow the appeal as it relates to the operation of the deductibles provision of the policy but would otherwise dismiss the appeal. (at p237)

MASON J. The issue in this appeal relates to the extent of the liability of the appellant, the Government Insurance Office of N.S.W., under its Contractors' All Risks Policy of Insurance (which refers to the appellant as "the Office"), issued to the respondent in 1971. The policy provided the respondent with insurance cover in connection with work which it was undertaking under a contract with the Maritime Services Board of New South Wales for the development of the Port of Botany Bay. By that contract the respondent agreed to construct an armoured embankment extending southwards into the bay from its northern shore. In consequence of two storms and a series of "episodes" involving high winds and high waters which occurred between February 1974 and June 1975, severe damage was done to the embankment. After each storm the respondent set about the task of restoring the embankment to the state in which it was immediately before the storm. Unfortunately this work of restoration was itself damaged by episodes which occurred subsquently. (at p238)

2. The policy contained provisions requiring the respondent to bear in respect of each "occurrence" arising out of "storm, tempest . . . loss or damage by water" "the first $100,000". The respondent, in claiming from the appellant an amount representing the damage done by the storms and episodes, including the damage done to the work of restoration, asserted that these provisions had no application to damage done to the work of restoration, this damage forming part of the recoverable loss or damage arising from the antecedent storm. This element in the respondent's claim, together with a claim for interest, was rejected by the appellant, resulting in an arbitration pursuant to the terms of the policy. It is these two aspects of the respondent's claim that are the issues in the appeal. (at p238)

3. The arbitrator stated a special case for the Supreme Court of New South Wales under s. 19 of the Arbitration Act 1902 (N.S.W.), as amended. The questions asked in the special case related to the two issues to which I have referred: (1) whether the respondent was entitled to recover on the basis already explained, and (2) whether the arbitrator had power to award interest on any sum awarded in the course of the arbitration. The Supreme Court (Meares J.) returned answers which were favourable to the respondent. The arbitrator ultimately made an award dated 2nd December 1977 in favour of the respondent, annexing copies of the special case and the Supreme Court judgment. The award was for $862,530.10 which included the following items:

"(a) Restoration of the property to its condition immediately before the February and May 1974 storms -

$473,087.70

less inapplicable costs 25,000.00 $448,087.70
. . .
(f) Interest at 12 1/2% p.a. from payments
due to 30 November 1977 $224,602.00" (at p239

4. The appellant then applied for an order setting aside the award on the ground of error of law on the face of the award, the alleged errors being the answers given by Meares J. to the questions asked in the special case. The respondent applied for an order registering the award as a judgment of the Supreme Court. Meares J. dismissed the appellant's application, holding that the answers which he had given earlier were correct. He made an order that the award be registered as a judgment of the Court. The Court of Appeal (Reynolds and Samuels JJ.A., Mahoney J.A. dissenting) dismissed an appeal from this order, as well as a cross-appeal from an order dismissing the application to set aside the award. (at p239)

5. The policy provides
"that the Office will, subject to the Terms Exclusions and Conditions contained herein and any warranty or endorsement hereon, indemnify the Insured against the Contingencies specified in the within Schedule, actually occuring during the period stated in the Schedule or during any period for which the Office may accept payment for the renewal of this Policy." (at p239)

6. Section 1 of the policy contains provisions under three separate headings - "PROPERTY INSURED (Material Damage)", "EXCLUSIONS TO SECTION 1" and "PROVISIONS APPLYING TO SECTION 1". Under the heading "PROPERTY INSURED (Material Damage)", this provision appears:
"The Office hereby agrees with the Insured that if at any time during the period of insurance stated in the Schedule, or during any further period of extension thereof, the property or any part thereof described in the Schedule shall suffer any unforeseen loss or damage from any cause other than those specifically excluded, in a manner necessitating repair or replacement, the Office will pay or make good all such loss or damage up to an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in all the total sum expressed in the said Schedule as insured hereby." (at p239)

7. Under the heading "EXCLUSIONS TO SECTION 1" it is provided that:

"The Office shall not, however, be liable for:
(a) the deductibles stated in the Schedule to be borne by the Insured in

any one occurrence other than lightning or explosion;"
Clearly, the definition of "any one occurrence" is central to the application of the deductibles provision. The remaining paragraphs under this heading specify loss or damage of various kinds, including fire. (at p240)

8. In the Schedule to the policy there is a description of the insured items. The property insured

under Section 1, including the contract works, is there expressed to be insured for $32,084,282. This description is followed by a provision headed "DEDUCTIBLES". The provision is in these terms: "Amounts to be borne by the Insured in respect of each and every occurrence arising out of
(a) earthquake, storm, tempest, hurricane, cyclone, flood, inundation, subsidence, landslide, collapse or loss or damage by water the first $100,000

(b) any other cause, except lightning and explosion the first $5,000" (at

p240)

9. The respondent places great reliance on that part of the "PROVISIONS APPLYING TO SECTION 1" which bears the sub-heading "Memo 2. Basis of Loss Settlement:" It provides: "In the event of any loss or damage the basis of any settlement under this Policy shall be
(a) in the case of any damage which can be repaired - the cost of repairs necessary to restore the property to its condition immediately before the occurrence of the damage less salvage, or
(b) in the case of a total loss - the actual value of the property immediately before the occurrence of the loss less salvage, provided always that the provisions and conditions have been complied with. The Office will make payments including progress payments only after being satisfied by production of the necessary bills and documents that the repairs have been effected or replacement has taken place, as the case may be.
All damage which can be repaired shall be repaired, but if the cost of repairing any damage equals or exceeds the value of the property immediately before the occurrence of the damage, the settlement shall be made on the basis provided for in (b) above."
Again, "the occurrence" is made the touchstone of the measure of recovery. (at p240)

10. An examination of the first issue, that relating to the "Deductibles", requires a more detailed statement of the facts as found by the artibrator. For convenience I shall confine this statement to facts relevant to the February storm which may be taken as a sufficient example of the facts relating to the two storms. The storm which occurred on 20th February 1974 caused very considerable damage to the core of the embankment and other features of the construction work. Repairs were commenced and partly completed before 14th to 15th March when "the March 1974 episode" occurred. This episode damaged the restoration work which had been undertaken to repair the damage caused by the February 1974 storm and it had to be done again. Before it was completed further damage was done to the repair work by the April episode which occurred on 13th April 1974 and by the May episode which occurred on 2nd and 3rd May 1974. (at p241)

11. The arbitrator found that the cost of repairing the damage caused by the March episode, which was completed on 18th March, was $15,879.06. The arbitrator stated: "Such damage would not have taken place had it not been for the state to which the embankment had been brought by the February 1974 storm." The arbitrator found that the cost of repairing the damage caused by the April episode, which was carried out between 10th and 24th April, was $45,463.62. Of this the arbitrator said: "Only 20% of this damage would have taken place had it not been for the state to which the embankment had been brought by the February storm." The cost of the repair of the damage done by the May episode was $66,109.65. The arbitrator found that only 30% of this damage would have taken place had it not been for the state to which the embankment had been brought by the February 1974 storm. (at p241)

12. Paragraph 16 of the special case is in these terms:
"The damage to the embankment done by the March, April and May 1974 episodes occurred wholly within the area of damage done by the February 1974 storm, the February damage being partly repaired at the time of the happening of the later damage. The costs of repairing such damage were all costs of repairs done in the course of restoring the embankment to its condition immediately before the February 1974 storm, and also all costs of restoring it to its condition immediately before the March, April and May episodes respectively." (at p241)

13. In the Court of Appeal, Reynolds J.A., with whom Samuels J.A. agreed, thought that the liability of the appellant depended on the construction of the promise to pay as expanded by Memo 2. He construed Memo 2 as requiring the payment of the cost of repairs which were in fact properly and reasonably incurred. He considered that the provision for progress payments indicated "real costs" were being referred to and not estimated costs. He also considered that the "Deductibles" provision did not qualify the promise to pay. The possibility that each episode may have answered the description of an occurrence was of no relevance as "the insured suffered no loss from the so-called episodes from which the deduction should be made. The payment for that loss was already comprehended in the existing promise to pay the cost of restoration. No claim was made by the insured or needed to be made." Essentially the outcome of the appeal hinges on the construction given by the Court of Appeal to Memo 2 and the "Deductibles" provision. (at p242)

14. As the operative words of the policy indicate, it is a policy of indemnity. The provisions in Section 1 do not give it a different character. The promise there expressed is a promise to "pay or make good all such loss or damage", that is, "any unforeseen loss or damage from any cause other than those specifically excluded, in a manner necessitating repair or replacement". Meares J. thought that the words "make good" conferred on the appellant an option to reinstate. Even so, this would not deny the policy's character as one of indemnity (Smith v. Colonial Mutual Fire Insurance Co. Ltd. (1880) 6 VLR, at p 203), the liability of the appellant as insurer being governed by the terms of the policy. (at p242)

15. The reference to "cause" is something of a misnomer because the "Exclusions" specify some items of loss which are not expressed to be related to any cause. Paragraph (a) is a case in point. Though an exclusion of liability, it is not an exclusion of liability for loss or damage from a cause. It is plain enough that the "Exclusions" provisions, and in particular par. (a), are directed to loss or damage attributable to an occurrence arising from a cause. The respondent seizes on this feature of the policy in making the point that its case, based on the arbitrator's findings, is that the loss attributable to the February storm, taking it as an example, extends to and includes the cost of restoration of the embankment to its antecedent state, subject to an application of the "Deductibles" provision in respect of that occurrence. This, the respondent says, is the inevitable consequence of applying Memo 2 which extends to "the cost of repairs necessary to restore the property to its condition immediately before the occurrence of the damage". Thus it is said that the application of the "Deductibles" provision to the damage caused by subsequent episodes leaves untouched and unaffected the ascertainment of "the cost of repairs necessary to restore the property" to its condition before the February storm within the meaning of Memo 2. (at p242)

16. The effect which the respondent gives to Memo 2 would no doubt be correct if it stood on its own. The question here is whether it should be so understood when the policy also contains par. (a) of the "Exclusions" provisions and the "Deductibles" provision. According to the respondent's argument they present no difficulty; in the circumstances of this case the appellant's promise to pay

or make good the damage occasioned by the February storm, measured in accordance with Memo 2, is qualified only by the application of par. (a) and the "Deductibles" provision the effect of which is that the respondent bears the initial $100,000, but no more. (at p243)

17. The contrary argument of the appellant is that the policy should be read as a whole and that, so read, it requires that damage caused to the embankment is to be attributed to the particular occurrence which actually, that is physically, brought it about and that the damage so brought about is to be separately assessed so that the "Deductibles" provision applies to each such assessment of damage in respect of each occurrence. There are three provisions which give particular support to the argument. One is the "Deductibles" provision itself. It speaks of "Amounts to be borne by the Insured in respect of each and every occurrence". As Mahoney J.A. observed, "The word 'amount' refers to an amount which is, prima facie, payable by the defendant under the policy, i.e., to that which is payable where there is a liability because of loss or damage caused to the property by a non-excluded cause. Where there is such an amount, the Deductibles Provision requires that it be determined 'in respect of' what 'occurrence' that amount is payable". (at p243)

18. The second provision is Memo 1. It provides that if the cover available to the respondent under Section 1 is reduced by claims which have been met, the insurance will be reinstated to full cover "from the time of the loss, accident or occurrence up to the expiry of the insurance" for an additional premium. There is a proviso that the appellant shall "never be liable for more than the respective items insured stated herein in respect of any one loss, accident or occurrence". The language of Memo 1 emphasizes the idea that "each loss, accident or occurrence" is treated for the purposes of the policy as a separate event. (at p243)

19. When the promise to pay or make good the damage is read with par. (a) of the "Exclusions" and the "Deductibles" provision it is susceptible of a separate application to the damage caused by each single occurrence, each occurrence requiring separate treatment for the purpose of quantifying the amount of the indemnity. This interpretation is reinforced by Memo 2. It measures the extent of the appellant's liability by reference to the cost of "repairs necessary to restore" the property and, in so doing, it assumes that there is a liability to pay or make good the damage which is physically caused by the particular occurrence arising from a non-excluded cause. (at p243)

20. The example given by Mahoney J.A. in his dissenting judgment of damage done to work of restoration by an excluded cause, namely fire, is a telling one. It can scarcely have been intended by the parties that the appellant would be liable for damage done by a totally excluded cause constituting a separate occurrence merely because the damage was done to restoration work undertaken by way of repair in respect of damage arising from a non-excluded cause. (at p244)

21. With the possible exception of the reference in the last paragraph but one of Memo 2, the references to "cost" in that Memo are references to "actual", not "estimated", costs. This emerges from the provision that "all damage which can be repaired shall be repaired" and by the provision that "The Office will make payments including progress payments only after being satisfied by production of the necessary bills and documents that the repairs have been effected or replacement has taken place". Even if the reference in the second last paragraph is to "estimated costs of repair", it does not assist the respondent's case. It then becomes necessary to estimate the costs of repairing the damage caused by the February storm and excluding from that estimate the costs of repairing damage done by subsequent episodes. (at p244)

22. The appellant claims to derive further support for the same idea from Endorsements 2 and 3.

They aggregate a number of occurrences causing loss within a "defined period" for the purpose of the "Deductibles" provision. By virtue of the application of the Endorsements, the appellant becomes entitled to one deduction only, although loss has been caused by what would otherwise be more than one occurrence. The Endorsements operate when different damage is done by each occurrence within the specified period. The appellant's argument is that the two Endorsements constitute the only exception to the operation of the Deductibles provision and that they are accordingly to be regarded as confirming the construction of the Policy for which the appellant contends. For my part, I doubt whether the two Endorsements can be so regarded. They appear to me to be directed to special situations. For this reason it may be unsafe to place too much reliance on the assumptions on which they proceed. However, the presence of the two Endorsements is entirely consistent with the construction which the appellant puts forward. (at p244)

23. Although I do not accept the appellant's submissions on Endorsements 2 and 3, the other provisions in the policy which I have discussed support the appellant's interpretation of the policy. In arriving at this conclusion I do not find it necessary to consider the doctrine of proximate cause on which the appellant also relied. The policy, as I construe it, leaves no room for the application of the doctrine. This is because the policy imposes on the respondent a liability in respect of the physical damage brought about by "each and every occurrence". Consequently it makes it irrelevant to enquire for present purposes whether the storms rather than subsequent episodes were the proximate cause of the damage. For the same reason the arbitrator's finding that a proportion of the damage caused by the subsequent episodes would not have been caused but for the damage by the February storm and by the May storm are irrelevant. (at p245)

24. In deciding that the arbitrator had power to award interest the Court of Appeal accepted that it was established by authority that, prior to 1972 when the Supreme Court Act, 1970 (N.S.W.) came into force, an arbitrator had implied power to award interest in those cases in which a jury could have done so under s. 140 of the Common Law Procedure Act, 1899 (N.S.W.), as amended. This is the view that has been taken in the more recent cases, Chandris v. Isbrandtsen-Moller Co. Inc. (1951) 1 KB 240 overruling Podar Trading Co. Ltd., Bombay v. Francois Tagher, Barcelona (1949) 2 KB 277 . See also Evans v. National Pool Equipment Pty. Ltd. (1972) 2 NSWLR 410, at p 416 ; Nea Tyhi Maritime Co. Ltd. of Piraeus v. Compagnie Grainiere S.A. of Zurich (The "Finix") (1978) 1 Lloyd's LR16 . (at p245)

25. The appellant challenged the correctness of this approach on the footing that it proceeds on a misapprehension of what was decided in Edwards v. Great Western Railway Co. [1851] EngR 881; (1851) 11 CB 588 (138 ER 603) , the foundation decision. The appellant pointed out that there a special case was stated by an arbitrator appointed by an order of the court by virtue of which issues in the action were referred to him for decision. The appellant submitted that the court's decision that the arbitrator had power to award interest was explicable on the footing that he had been appointed pursuant to an order of the court to discharge functions which would otherwise have been committed to the jury in accordance with s. 28 of the Civil Procedure Act 1833 (3 & 4 Wm. IV c.42). Although that section authorized a jury to award interest, it made no mention of an arbitrator. (at p245)

26. However, the respondent's case is that the arbitrator was appointed by the court in the exercise of its inherent jurisdiction and that there was referred to him for decision, not merely issues in the action, but also "all matters in difference" between the parties. Accordingly, the respondent submitted that the decision should not be narrowly read as one which related to the power of an arbitrator appointed by the court. Instead, it should be read as one which held that an arbitrator,

whether appointed by the court or not, has power to award interest. It is the respondent's view of Edwards that has prevailed in the subsequent decisions, notably in the Court of Appeal in Chandris and Nea Tyhi Maritime Co. (at p246)

27. The basis of the decision in Edwards has been closely analyzed by the Full Court of the Supreme Court of Victoria in Robert Salzer Constructions Pty. Ltd. v. Barlin-Scott Air Conditioning Pty. Ltd. (1980) VR 545 . That analysis led the Full Court to the conclusion that in Edwards the arbitrator was in effect a special referee to whom was deputed the duty of acting in place of the jury and who was clothed, by virtue of the Court's order, with the powers of the jury. On this footing the Full Court disagreed with the Court of Appeal's interpretation in Chandris on the basis of the decision in Edwards. Further, it disagreed with the observations of Tucker L.J. in Chandris (1951) 1 KB, at p 259 where his Lordship concluded that the arbitrator's power to award interest derives from "the submission to him of the disputes, which necessarily involves that he has to determine those disputes according to the law of the land, and that he is clothed with authority to give to the claimant such rights and remedies as would have been available to him in a court of law having jurisdiction to determine the same subject-matter". Consequently, in the view of the Full Court, Chandris was wrong in holding that an arbitrator appointed by the parties had power to award interest when that power was not conferred upon him by the submission and there was no power to award interest at common law. (at p246)

28. For my part, I do not think that the answer to the question should depend on what was decided in Edwards over one hundred years ago when the basis of the Court's decision was not clearly elaborated in the judgment. The real question, as it seems to me, is whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter. (at p246)

29. In the United States it is accepted that the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, provided that they do not violate any rule of law (5 Am. Jur. (2d), p. 539). There it has been held that the parties may authorize the arbitrator to grant equitable relief, even including relief by way of injunction (5 Am. Jur. (2d),p. 620; 70 A.L.R. (2d), p. 1058). I see no reason why the parties cannot authorize an arbitrator to decide whether interest is payable by one party to another, just as they can authorize him to decide whether damages should be awarded. It is to the submission that one looks to find the powers of the arbitrator, though the powers thereby conferred are supplemented by the Arbitration Act and by other relevant statutory provisions. (at p247)

30. The question, then, is whether the parties by their submission authorized the arbitrator to award interest. The provision in the policy which constitutes the submission does not specifically refer to interest. It merely requires the reference to arbitration of "All differences arising out of this Policy". But it contemplates that all such differences shall be arbitrated in the light of the general law applicable to the subject matter in dispute. (at p247)

31. By s. 94 of the Supreme Court Act the Court is empowered to award interest at such rate as it thinks fit in the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect. The section replaced s. 140 of the Common Law Procedure Act which was more restricted in its application. Although s. 94 is expressed in the form of an authority of the Court, its effect is to alter the antecedent principle of law regulating the payment of interest on moneys included in judgments

between the date when the cause of action arose and the date when the judgment takes effect. The parties' submission to arbitration of all their differences is to be construed in the light of the new principle of law regulating the payment of interest enshrined in s. 94. There is to be implied in the submission an authority in the arbitrator to award interest conformably with s. 94 because the Supreme Court is given by the Arbitration Act a supervisory function in relation to an arbitration and because an award of an arbitrator is enforced as if it were a judgment or order of the Court (s. 14). (at p247)

32. In the result I would allow the appeal to the extent to which it relates to the operation of the "Deductibles" provision but I would dismiss it to the extent to which it relates to the question of interest. (at p247)

MURPHY J. I agree with MASON J. (at p247)

WILSON J. In my opinion, each of the storms which in this case have been described as "episodes" was a separate occurrence causing loss or damage, and therefore gave rise to an obligation on the respondent to bear the first $100,000 of the cost of repair resulting from each such occurrence. I cannot usefully add to the reasons advanced by Stephen and MASON JJ. in support of this conclusion. (at p247)

2. I find the question of the power of the arbitrator to award interest to be a difficult one. The existence of such a power must be found either in statute or in the agreement of the parties to the reference. There is no statute conferring such a power on arbitrators in New South Wales; indeed, it was only as recently as 1970 that such a power was conferred on the Supreme Court itself (Supreme Court Act, 1970, s. 94). There is no express authority to be found in the contract. It is said that a term is to be implied in the contract that the arbitrator should decide according to the existing law of contract and should exercise every right and discretionary remedy given to a court of law. I have no quarrel with the first part of that statement, but the concluding phrase in my respectful opinion goes too far. The process of implying terms in a contract is to be embarked upon with caution, as recent cases have reminded us: Liverpool City Council v. Irwin [1976] UKHL 1; (1977) AC 239 ; B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1977) 52 ALJR 20 . In the result, I would agree with the reasoning in this regard of Barwick C.J. and conclude that the arbitrator was without authority to award interest. (at p248)

3. I would allow the appeal. (at p248)

ORDER

1. Appeal allowed in so far as it relates to "multiple deductibles".

2. Appeal dismissed in so far as it relates to double handling of rock from stockpiles, Maritime Services Board supervision, financing charges and lost rock costs.

3. Appeal dismissed in so far as it relates to the power of the arbitrator to award interest.

4. That each party pay its own costs of these proceedings and proceedings in the Supreme Court of New South Wales.

5. The respondent pay the sum of $801,411.65 to the appellant.

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