HIGH COURT OF AUSTRALIA

Tuta Products Pty. Ltd.

Vs.

Hutcherson Bros. Pty. Ltd.

(Barwick C.J.(1), McTiernan(2), Menzies(3), Windeyer(4) and Owen(5) JJ.
Barwick C.J.(1), Menzies(3), Walsh(6), Gibbs(7) and Stephen(8) JJ.)

1 September 1972

CATCHWORDS

Arbitration - Award - Setting aside - Error of law on face of award - Award expressed to be made in conformity with judgment of Supreme Court on case stated by arbitrators - Whether judgment part of award.

Building Contracts - Construction - Remuneration of builder - Interest on progress payments - Failure of architect to issue certificate - Whether further written request for certificate necessary - Increased costs due to delays consequent upon relocation of sewer pipe - Claim under variations clause.

HEARING

Sydney, 1971, November 11, 12; 1972, February 1. 1:2:1972
Sydney, 1972, April 24, 26; September 1. 1:9:1972
APPEAL from the Supreme Court of New South Wales.

DECISION

1972, February 1.
The following written judgments were delivered : -

BARWICK C.J. The appellant and the respondent were parties to a submission certain questions arising under a construction agreement which they had made with each other. During the course of the arbitration, the arbitrators stated a case for the opinion of the Supreme Court. The Court answered the questions thus asked of it. Ultimately the arbitrators made their award. In the course of reciting the circumstances of the submission and of the making of the award, the arbitrators stated that their award was in conformity with the opinion of the Supreme Court, presumably as expressed in answer to the questions asked in the stated case. The relevant statement was as follows "We award in conformity with the said judgment of the Supreme Court as follows". (at p257)

2. The appellant sought to set aside the award for error of law appearing on its face, the error said to be the said opinion of the Supreme Court, or perhaps, more correctly, the error of the arbitrator in expressing that opinion as their own. The judge of the Supreme Court who heard this application in the first instance treated that opinion of the Supreme Court as appearing on the face of the award

and himself as bound by it. On appeal from his refusal to set aside the award, the Court of Appeal Division adhered to its previous opinion upon the stated case and dismissed the appeal. The appellant now appeals to this Court on the ground that the Supreme Court was in error in not setting the award aside for error of law appearing on its face. In substance, the error is in the answers to the questions asked in the stated case. We have heard argument as to whether any such error so appears. If it does not, the appeal must be dismissed. If it does, the question whether the propositions of law so held to appear on the face of the award are erroneous remains to be considered. (at p257)

3. It must strike an intelligent observer as somewhat farcical that a procedure designed for resolving questions, of which those arising out of the present submission are a common example, with economy, celerity and finality, should be as protracted and as fraught with such uncertainty and technicality as the arbitral process has been in this instance. The opinion of the Supreme Court was taken and, as might have been expected, was acted upon. Such an opinion could not have been reviewed by this Court because it was merely consultative. This, the parties in requesting the arbitrators to seek it, must have known. However, they now seek to appeal the consultative opinion of the Supreme Court upon the fiction, for in my opinion with due respect to those who do not share it, it is at best no more than a fiction, that that opinion and the stated case on which it was expressed form part of the arbitrators' award. (at p258)

4. Many judges of the past have regretted, as I do now, the exception to the finality of an arbitrator's award which was made in cases decided before Hodgkinson v. Fernie [1857] EngR 940; (1857) 3 CB (NS) 189, (140 ER 712) However, it is with us, the legislature of New South Wales not having seen fit by legislation to remove it. Meantime, courts, in my opinion, should not be overready to seek for points of law which are not clearly apparent on the face of the award. Finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award, established only after successive appellate processes. (at p258)

5. The question now to be resolved is whether there appears in the arbitrators' award a proposition of law which in my opinion is erroneous. Lord Dunedin in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. (1923) AC 480, at p 487 expressed the matter thus :

> "An error of law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

The question is not whether, in arriving at their award, the arbitrators must have decided a point of law which can be inferred from the award and its circumstances with sufficient certainty. The precise point of law must be apparent upon perusal of the award itself so that the award appears not to be in conformity with the relevant law. We are not authorized to go outside the award itself in an endeavour to find a point of law which must have been encountered and decided by the arbitrators in reaching their award. The award in which we must be able to see and identify the proposition of law will of course include those documents which can be seen with certainty to have been intended by the arbitrator to form part of their award. (at p258)

6. The arbitrators' award in this case does not annex any documents or expressly incorporate any documents. Apart from the assertion that what they were about to award was in conformity with the

Supreme Court's opinion, nothing could be suggested as exposing on the face of the award a proposition of law. Quite clearly, the said recital does not express any such proposition. But it is said that the recital incorporates as part of the award, the whole of the case stated for the opinion of the Supreme Court the answers given to the questions there asked and the reasons given by the Supreme Court for giving those answers. It is then said that perusal of the documents so incorporated will disclose propositions of law which will be judged to be erroneous. These submissions correctly recognize that unless the case stated, and at least the Supreme Court's answers form part of the award, we would not be warranted in looking at that case, the answers and the judicial reasons. (at p259)

7. But I am unable to accept the proposition that in saying that what they awarded was in conformity with the opinion of the Supreme Court, the arbitrators were incorporating in their award the proceedings of the case stated. For them, if not for the parties, those proceedings were in the past. Without them saying so, it would be assumed that they had accepted and acted upon the answers given by the Supreme Court to the questions posed for it. That the arbitrators should expressly reassure the parties that they had done so and that in their opinion their award was in conformity with that judgment, does not mean in my opinion that they intended to make those proceedings part of their award. Had they for example, recited that the award was in conformity with the agreement between the parties, that agreement would not for that reason alone, become part of the award so that opportunity would be offered to examine the award against the terms of the agreement to find a proposition of law which could be attacked as erroneous. Cf. D. S. Blaiber and Co. Ltd. v. Leopold Newborne (London) Ltd. (1953) 2 Lloyd's Rep 427.

The assertion that they had acted on and produced an award in conformity with the Supreme Court's opinion does not, in my opinion, involve the incorporation of that opinion in the award. (at p259)

8. In my opinion, no proposition of law appears on the face of this award and the application to set it aside should fail. (at p259)

McTIERNAN J. I agree in the reasons of the Chief Justice and also in his conclusions. (at p259)

MENZIES J. When this appeal from the Court of Appeal of the Supreme Court of New South Wales came on for hearing, a matter preliminary to the merits of the appeal emerged. It was whether a proposition of law, which might be shown to be an error of law, appeared upon the face of an award which the appellant had moved to have set aside. For the appellant it was contended that it did because it appeared upon the face of the arbitrators' award that they had construed the contract, which gave rise to the arbitration, in a particular way in making their award of what was owing thereunder. It was said that the arbitrators had construed the contract as it had been construed by the Court of Appeal of the Supreme Court of New South Wales when, upon an earlier occasion, it was before that Court upon a case stated by the arbitrators for the opinion of the Court. It was argued that, if this were so and it were also to appear to this Court that the construction adopted by the arbitrators following the Court of Appeal was wrong, the consequence would be that there was an error of law upon the face of the award warranting setting it aside. (at p260)

2. In their award the arbitrators had recited inter alia as follows :

> " . . . AND HAVING REGARD to the Judgment of the Supreme
> Court dated 23rd September 1970 on a case stated to the Court

relating to matters in dispute in this arbitration".

Furthermore, the actual findings of the arbitrators were prefaced with the words :

"We find in conformity with the said judgment of the
Supreme Court as follows . . ." (at p260)

3. What had happened is that the arbitrators did state a case - to which was annexed the various contract documents - stating the disputes which had arisen and been referred to them for settlement, and recording their findings upon those disputes seriatim. At the end of each finding a question was propounded. For example, the first matter in dispute related to lift installation and the question asked is typical of that asked in relation to other matters. It was, "The question for opinion is whether, upon the true construction of the Agreement and in the premises foregoing, the Builder is entitled to payment of the said sum of One thousand two hundred and one dollars and thirty cents ($1,201.30)." Some questions were even more precise. For instance, a question relating to payment of interest asked additionally "Whether the arbitrators erred in law in making the findings set forth in pars. 23, 24 and 25 hereof". (at p260)

4. The present appellant was dissatisfied with the answers to the arbitrators' questions given by the Supreme Court. It informed the arbitrators that it did not accept, and wished to contest, the correctness in law of those answers. Seemingly, it was to make this possible that the foregoing references to the judgment of the Supreme Court were embodied in the award. (at p260)

5. After the award had been given, a summons to set it aside was heard by Isaacs J. who admitted in evidence inter alia the case stated as aforesaid, the answers of the Supreme Court and the reasons of the Court for those answers. His Honour decided as follows :

> "Summons to set aside award dismissed for the reason that
> I follow the judgment of the Court of Appeal given on Wednesday,
> 23rd September 1970 in the matter of the case stated by
> the arbitrators (Ex. E above)."

Exhibit E was the statement of the reasons of the Court of Appeal, pronounced on 23rd September 1970, in answering the questions posed in the case stated. From the order made by his Honour the appellant appealed to the Court of Appeal which dismissed the appeal. Jacobs J.A., speaking for the Court, said :

"This is an appeal from an order made by Isaacs J. on 16th
February 1971 when he dismissed a summons to set aside an
award in an arbitration. The reasons why his Honour came
to that conclusion were in effect that he followed the decision
of this Court given on 23rd September 1970 in the matter of
a case stated by the arbitrators in this same arbitration. Of
course, the learned Judge had no alternative but to follow this
course, and we, of course, have no alternative but to follow the
decision of this Court given on 23rd September 1970." (at p261)

6. It is not possible, of course, at this stage, to decide whether or not there was error of law upon the

face of the award, but, in my opinion, if, and to the extent that, the Court of Appeal wrongly construed the contract in giving its opinion upon the case stated, there was error of law upon its face. I do regard the arbitrators as stating unequivocally that, in deciding as they did, they adopted the Court of Appeal's construction of the contract. To invite the review of an arbitrator's award by the court it is not necessary that it should appear from the award itself that an error of law was made by the arbitrators ; all that is necessary is that the arbitrators should, by the award itself, show the legal basis for their award which can then be examined by the court. It is only when the court speaks that what appears upon the face of the award has the character of error of law. In the Supreme Court both Isaacs J. and the Court of Appeal necessarily acquitted the arbitrators of any error of law because, in making their various findings, they accepted and applied the construction of the contract adopted in the earlier judgment of the Court of Appeal. The contrary conclusion would seem to me to be imperative, if it should happen that the judgment so applied was, in the opinion of this Court, wrong in law. The arbitrators meant to decide according to law. In order to do so they decided in conformity with the opinion of the Court ; if that opinion was wrong in law, the arbitrators were wrong in law and their error appears upon the face of their award. The award reveals the construction of the contract upon which it was based. The contract may thereupon be looked at. If that construction was a wrong construction then error of law appears upon the face of the award. (at p262)

7. Before referring to the authorities which, in my opinion, support the conclusion which I have expressed, I would observe that the kind of review that is here sought does not infringe the principle that when parties submit their disputes to arbitrators they must abide by the decisions which they get. It is, of course, possible for parties to refer matters to arbitration in such a way that the arbitrators are invited to decide for themselves a question of law. Where there is such a submission, error of law affords no ground for setting aside the award. Where, however, parties choose to make a more limited reference and submit disputes to arbitrators to decide in accordance with law and it appears from their award that the arbitrators have failed to do so, there is no detraction from the function of the arbitrators if the award is set aside because the arbitrators have not done what is required of them by the submission made to them. It is, however, well established that, only in special cases, will the court interfere with an award. One such case is when error of law appears upon its face. (at p262)

8. In the course of argument many authorities were cited. I refer but to a few of these which show clearly enough, I think, the course of judicial decision. (at p262)

In Kent v. Elstob(1802) 3 East 18, at p 20 (102 ER 502, at p 503) , Grose J. said :

> "It is evident that he meant to determine according to law
> and he has mistaken it." (at p262)
>
> In Landauer v. Asser(1905) 2 KB 184, at p 191, Kennedy J said :
>
> "It is, I think, quite clear that the umpire bases his decision
> that Messrs. Asser, the sellers, are, and Messrs. Landauer, the
> buyers, are not entitled to the sum in dispute, entirely upon
> the terms of the contract of 3rd November 1903. Therefore,
> unless that contract, properly construed, justifies the umpire's
> conclusion, the award is upon the face of it bad in point of law." (at

p262)

11. In Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.(1923) AC 480, at p 487, Lord Dunedin said :

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award . . . some legal proposition which is the basis of the award and which you then say is erroneous." (at p263)

12. In F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.(1933) AC 592 , it was held that the wrong construction of a clause to which the arbitrator referred in his award was an error patent on its face. Lord Russell of Killowen said (1933) AC, at p 607:

> "My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision... The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

His Lordship also referred to British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.(1912) AC 673, where no specific question of law had been submitted. He said(1933) AC, at p 609:

"The matters referred were a claim for the price of goods on the one hand and a counter claim for damages on the other. Questions of law arose which had to be decided as being material in the decision on the respective claims. The arbitrator sought for and obtained from a Divisional Court answers to a special case as to how the questions of law should be decided. He then published his award, from which it appeared that it was based upon the answers of the Divisional Court. The Divisional Court and the Court of Appeal refused to set aside the award; but on appeal to this House it was set aside on the ground that the answers given by the Divisional Court were erroneous, and that therefore there was error of law appearing upon the face of the award." (at p263)

In the British Westinghouse Co. Case(1912) AC 673, as here, there had been a case stated for the opinion of the court and it appears that the arbitrator stated that he had adopted and acted upon the

answers given by the court. Furthermore, a copy of the special case and the answers of the court was annexed to the award and made to form part of it. The House of Lords found that the questions of law stated by the arbitrator in the special case had been wrongly answered by the courts below, so that the award could not stand and must be sent back to the arbitrator. It appears to me that what the House of Lords was concerned with, however, was that the arbitrator acted upon the answers which had been received. Viscount Haldane said(1912) AC, at p 686:

> "No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But, in my opinion, that is the only reason why it cannot be appealed, and if the law embodied in it is afterwards set out on the face of a final award, I see no reason for thinking with Vaughan Williams L.J. that the Act intended to make the statement of the law appearing on the face of the award binding on a higher tribunal before which the award might come for review."

The words in the foregoing statement which I emphasize are, "if the law embodied in it is afterwards set out on the face of a final award". This is what happened here. (at p264)

14. In Gianfriddo v. Garra Constructions Pty. Ltd. (1971) VR 289, at pp 289-290, Smith J, after a review of the authorities, decided that where an arbitrator was asked the question "Has the owner given proper notice pursuant to cl. 6 (A) of the said agreement and, if so, what is the proper amount to be debited to the builder in accordance with the said clause?", and answered it as follows: "I consider the notice was correctly given, but the operation was suspended by the lodgment of a notice of arbitration in accordance with the contract", the court was entitled to look at cl. 6 (A), and also cl. 7 of the contract, relating to the lodgment of a notice of arbitration, to determine whether there was an error of law on the face of the award. Because his Honour decided that nothing in cl. 7 could suspend the operation of a notice under cl. 6, he found error of law upon the face of the award. (at p264)

15. Finally, in Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty. Ltd., Barwick C.J. said [1968] HCA 3; (1968) 118 CLR 58, at p 65:

> "If satisfied that he intended to expose his reasons for making it as part of his award, the Court will set the award aside if error of law fundamental to the award then appears. Such an intention may of course be inferred from surrounding acts and circumstances, or by construction of the award itself."

Windeyer J. said(1968) 118 CLR, at p 77:

"If an arbitrator ... expressly or impliedly makes his
conclusion depend upon the validity of a particular hypothesis of
law, then if that hypothesis be erroneous a court will quash
the award." (at p264)

16. In some of the cases cited it is said that, where an award is seen to be based upon the effect of a contract or other document, that document is incorporated in the award for the purpose of determining whether or not error of law appears upon the face of the award. From this way of stating the matter I am not concerned to differ. The point can, however, be stated differently by saying that, if it appears from the award itself that it is based upon a proposition of law, the court is not confined to the award to determine whether or not that proposition is in error. What I have in mind is that the problem which this Court faced in Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty. Ltd. (1968) 118 CLR 58is essentially different from the problem here. In this case it is not, I think, necessary to bring anything into the award in order to find a proposition of law which may, or may not, be in error. Here, not only is the construction of the contract fundamental to the award, but the arbitrators in their award have made plain what construction they have adopted of its various provisions in making their award. (at p265)

17. Accordingly, I consider that, if, and to the extent that, it should appear that the construction of the contract adopted by the Court of Appeal and by the arbitrators is wrong, error of law will have appeared upon the face of the award. In these circumstances it is my opinion that the hearing of the appeal should continue. (at p265)

WINDEYER J. I have arrived at the same conclusion as has my brother Menzies. I have read his judgment. I agree ; but I shall make some observations for myself. (at p265)

2. In Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty. Ltd. (1) I explained my understanding of the origin and scope of the well-established rule that the award of arbitrators is examinable by a court if error of law is apparent in it. I now supplement the references to authorities that Menzies J. has given by referring, without quoting them, to passages from other cases that were set out by Diplock L.J., as his Lordship then was, in Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd. (1963) 1 QB 201 Along with them I would put a sentence from the judgment that Sellers L.J. delivered in that case. Speaking of the doctrine concerning the effect of error of law on the face of an award, he said (3) :

> "The difficulty is in its application - not, I think, as to
> whether any particular document has been expressly incorporated
> in an award but whether it has, in the circumstance,
> to be regarded as the intention of the tribunal which made
> the award to include the document in question as part of its
> award and its reasoning." (at p265)

3. Long ago Williams J. in Hodgkinson v. Fernie [1857] EngR 940; (1857) 3 CB (NS), 189, at p 202 [1857] EngR 940; (140 ER 712, at p 717) expressed his regret - since then much shared by other judges - that the award of an arbitrator is not final and conclusive, but is open to challenge in a court if it exhibits on its face error in law. But this has been an established rule now for well over a hundred years. We must abide by it. If the appellant can shew from the award itself that it is founded upon a proposition of law which in the circumstances is examinable by this Court, then we cannot deny a party his right to come to this Court. At this point I think it useful to repeat Lord Dunedin's statement in Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd. (1923) AC 480, at p 487:

> "An error in law on the face of the award means, in their
> Lordships' view, that you can find in the award or a document

> actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

In the present case the arbitrators have said, in effect, that taking the judgment as a direction binding them in law, as they were bound to do, their award is founded upon it. (at p266)

4. The preliminary question now before us is whether in these circumstances the Court can examine the award for error in law. It is not, I think, to be approached by a meticulously literal comparison of the various paraphrases which have been put forward to explain the meaning of the phrase "error on the face of the award". The question is not so much one of literal form as of substance. When, as here, a document is referred to in an award the question is, adopting the words of Sellers L.J. that I have quoted, whether it was intended by the arbitrators to be regarded as forming part of their reasoning for their conclusion. In the present case the express references to the judgment of the Supreme Court shew I think such an intention. It may be that the arbitrators referred to the judgment as they did for the express purpose of making the legal proposition on which they based their award examinable by a court. Whatever their purpose was, the result of the reference to the judgment on the face of the award is, I consider, to make their conclusion examinable in point of law. I confess to misgivings about the logical justification of this doctrine. (at p266)

5. Arbitrators having obtained the directions of court upon questions propounded by a case stated would, it may be assumed, follow the directions given them by the court - that is to say they would approach the questions of fact for their determination in the way they were told would be in accordance with law. If, instead of simply doing as they were told, they should say in their award that they had done so, they make it challengeable in court ; whereas, if they had kept silence, it would have been final and conclusive. However, that anomalous result seems to be what the law now requires. It may be regarded cynically as emphasizing the wisdom of a tribunal refraining from giving reasons in any matter in which all that is required is a decision. However, in this case I think that the statement in the award that it was made in conformity with the judgment of the Supreme Court, whether it be there by design or chance, enables this Court to say whether it was in our judgment in conformity with law, and that at the instance of the appellant we are required to do so. (at p267)

OWEN J. I have had the opportunity of reading the judgment of my brother Menzies and agree with him that the preliminary question raised on the appeal should be answered in favour of the appellant. (at p267)

BARWICK C.J. A preliminary question arose in the argument of this appeal, namely, whether a proposition or propositions of law appeared on the face of the award made on 18th November 1970 in an arbitration between the parties. (at p267)

2. The Court, by majority, is of opinion that a proposition of law does so appear and that the appellant's appeal to this Court should proceed during the sittings of the Court in Sydney which will commence on 14th March 1972. (at p267)

3. Appeal allowed. Order of the Supreme Court of New South Wales, Court of Appeals Division, set aside and in lieu thereof order that the appeal to that court be allowed and that the order of Isaacs J. be set aside, and in lieu thereof order that the award of the arbitrators be set aside to the extent that

the arbitrators thereby awarded : -

> (i) that the respondent was entitled to $15,662.00 as expenses associated with delay in completion of certain works occasioned by the preservation on site of an existing sewer line ; and
>
> (ii) that the respondent was entitled to $2,649.98 as expenses to which he was put in maintaining the existing sewer line ; and
>
> (iii) that the above sums should be included in the total award which was for the sum of $64,955.83 ; and
>
> (iv) that the appellant pay the respondent four-fifths of the costs of the respondent as between party and party of and incidental to the arbitration other than costs of the application to the Supreme Court by way of stated case ; and
>
> (v) that there be no award as to the costs of the appellant ; and
>
> (vi) that the expenses of the arbitration be borne as to four-fifths thereof by the appellant and as to one-fifth thereof by the respondent ;
>
> and order that the matters of the respondent's claims to be paid for losses and expenses relating to delay in the resiting of and expenses in the maintenance of the said sewer line be remitted to the arbitrators for their reconsideration in conformity with the reasons of this Court published herein this day, and that the matter of the manner in which the costs and expenses of the arbitration should be borne by the appellant and the respondent respectively be remitted to the arbitrators to be reconsidered by them having regard to the orders now made. (at p268)

4. In accordance with the Court's order the appeal came on for hearing on 24th April 1972. The terms of the contract are set out in the judgment of Stephen J. (at p268)

5. R. J. Bainton Q.C. (with him R. L. Hunter), for the appellant, referred to Ess v. Truscott [1837] EngR 92; (1837) 2 M & W 385, (150 ER 806) ; Sharpe v. San Paulo Railway Co. (1873) LR 8 Ch App 597; Tharsis Sulphur & Copper Co. v. McElroy & Sons (1878) 3 App Cas 1040 ; Fung Kai Sun v. Chan Fui Hing (1951) AC 489, at pp 503-506 (at p268)

6. P. J. Jeffrey Q.C. (with him J.S. Coombs and J. E. Brownie), for the respondent, referred to Morris v. Morris [1856] EngR 12; (1856) 6 El & Bl 383 (119 ER 908)

Cur. adv. vult. (at p268)

September 1.

The following written judgments were delivered : -
BARWICK C.J. In this appeal I have had the advantage of reading the reasons

for judgment prepared by my brother Stephen. On the footing that the case stated by the arbitrators for the opinion of the Supreme Court of New South Wales and the answers given by that Court to the questions asked in the case stated and the Court's reasons for making those answers are all part of the arbitrators' award, I agree with the conclusions reached by my brother Stephen and with the reasons he has expressed for arriving at them. I agree with the order he proposes. (at p269)

MENZIES J. I have had the advantage of reading the judgment of Stephen J. allowing this appeal. I agree with the course his Honour would adopt to dispose of the matter and with his reasons for making the order which he proposes. (at p269)

WALSH J. The proceedings in the Supreme Court of New South Wales and the grounds upon which the appellant contends that the award considered in those proceedings contains error on its face are described in the reasons for judgment of Stephen J. His reasons set out, also, relevant provisions of the contract between the parties and of the specification to which it referred. Therefore, I may proceed immediately to a consideration of the questions raised by the appeal. (at p269)

2. In their award the arbitrators found that the builder (the respondent in this appeal) was entitled to payment by the proprietor (the appellant) of a sum of money, representing the increased costs of the nominated sub-contractor on the lift installation, due to a price adjustment provision in the sub-contract. This finding was in accordance with the answer given by the Court of Appeal Division of the Supreme Court to a question in a case stated by the arbitrators for the opinion of that Court. In their reasons their Honours expressed the opinion that the reference to sub-contracts in cl. A1.07 in the specification, which required the builder to bear increases in the cost of performing the contract and was expressed to apply to "all rates for the whole of the contract and sub-contracts", was to be read as limited to sub-contracts into which the builder entered by his own choice and as having no application to a sub-contract with a nominated sub-contractor. I do not disagree with that opinion. But I share the view stated by Stephen J. that the express provisions of cl. 21 (h) in the conditions annexed to the articles of agreement are on this question decisive in favour of the respondent. If there is any inconsistency between those provisions and any provisions in the specification, in my opinion those of cl. 21 (h) must prevail. (at p269)

3. It was submitted on behalf of the appellant that it was not correct to regard the respondent as having been bound to enter into the sub-contract which it made with the nominated sub-contractor. It was submitted that the respondent could have refused to do so, unless the sub-contract included a "no rise and fall" clause. Reliance was placed on cl. 13 of the conditions, which includes a provision that "no nominated sub-contractor need be employed . . . who will not enter into a sub-contract binding the sub-contractor by the like obligations to the builder in respect of the subject matter of the sub-contract as the Builder assumes by this contract to the Proprietor". In my opinion it is at least doubtful whether this provision would have entitled the respondent to object to entering into a sub-contract with the nominated sub-contractor unless it contained a "no rise and fall" clause. But if it be assumed that it would have entitled the respondent so to object, it is plain that it did not impose an obligation to object and it did not produce the result that the supplier with whom the respondent

entered into the sub-contract was not a nominated sub-contractor for the purposes of cl. 21. Furthermore, it is erroneous, in my opinion, to suggest that a failure by the respondent to object, in reliance upon cl. 13, to entering into the sub-contract could be taken into account in deciding whether the total mount which had to be paid to the sub-contractor was "properly expended", as required by cl. 21 (h). The stated case shows that the arbitrators found that the nominated sub-contractor's tender and its conditions, including a price adjustment provision, were accepted by the respondent on the architect's instruction contained in a letter. The arbitrators found, also, that at the time of the making of the head contract it was well known that lift installation contractors required the inclusion of a rise and fall provision in their installation contracts. In these circumstances it cannot be maintained that the respondent acted unreasonably in entering into the sub-contract or that cl. 21 (h) did not entitle the respondent to add to the contract price the amount by which what became payable to the sub-contractor exceeded the $15,000 mentioned in the specification. I am of opinion that on this question the appeal fails. (at p270)

4. The second question relates to the entitlement of the respondent to interest on the amounts due in respect of two certificates issued out of the architect's office but not signed by him. In my opinion, the Court of Appeal decided correctly that if the certificates were not certificates given by the architect for the purposes of cl. 25 (a) and cl. 25 (i), there was an entitlement to interest in accordance with cl. 20 (2). (at p270)

5. The argument for the appellant against the correctness of that decision took as its first step the proposition that a certificate could not be said to have "become due" until after there had been a written application for a certificate, in accordance with cl. 25 (a). This proposition is, in my opinion, of doubtful validity. It is true that it is provided in cl. 25 (a) that the builder shall be entitled to receive a certificate within seven days of his written application. But it does not seem to be a necessary consequence of that provision that it must be said that a written application is an essential requirement in order that a certificate may "become due". However, I am of opinion that even if the correctness of that first step in the argument be conceded it breaks down in its next step. Clause 20 (2) gives an entitlement to interest of which the conditions are that the architect shall refuse or neglect to issue a certificate for a period of ten days after two events have occurred, namely, that a certificate shall have become due and that it shall have been requested in writing by the builder. The argument is that if a prior request in writing is a necessary element in the occurrence of the event first mentioned, the other event must be the making of a second written request for a certificate. But, in my opinion, this argument can be sustained only by introducing into the provision a requirement not stated in it, that is, by reading it as if after the words "requested in writing" there appeared some such word or phrase as "again" or "for a second time". In my opinion, such a requirement would be so inconvenient and purposeless that it ought not to be regarded as imposed, unless it appears quite clearly that this intention is disclosed by the terms of the provision. It was said that it is necessary so to read cl. 20 (2), because otherwise the reference in it to the certificate having been requested in writing adds nothing. Such a consideration would have much greater weight if in all other respects the terms of the contract were precise and consistent. But this is not so. In my opinion, the introduction by a process of construction of something additional to what is required by the words used in the provision is not warranted. The reference to the request in writing may have been inserted to emphasize the requirement that there should be a written application for a certificate. It ought not to be taken to make it necessary that there should be two such applications in writing. (at p271)

6. The third question, concerning additional costs claimed to have been incurred because of the delay that took place in the relocation of the sewer line which was within the building site, has been

discussed so fully by Stephen J. that I may state my own opinion very briefly. As his Honour points out, the respondent did not rely in this Court on what his Honour describes as the first step taken by the Court of Appeal. The respondent submitted that, independently of any question whether the appellant had an implied obligation to ensure that the sewerage diversion would be carried out at a time which would permit the builder to adhere to the "order of work" set out in the specification, the claims of the respondent now under consideration should be allowed, in accordance with cl. 9 of the conditions. In my opinion, a decision in favour of the respondent on this part of the appeal cannot be made unless the submission is accepted that cl. 9 was applicable. I agree with the conclusion of Stephen J. that cl. 9 had no application to the claims now under discussion and I agree with his reasons for that conclusion. I refrain from stating any opinion concerning the further reasons, which his Honour went on to give, for holding that if, contrary to his view, cl. 9 could be applied to the claims, the appellant is, nevertheless, entitled to succeed on this part of the appeal. (at p272)

7. There remains for consideration the manner in which we should dispose of the appeal. I do not doubt that s. 12 of the Arbitration Act, 1902 (N.S.W.), as amended, gives to the Supreme Court an ample discretionary power to remit and that by the combined operation of ss. 12 and 13 of that Act the Supreme Court has a discretion, in appropriate cases, either to set aside an award or to remit a matter or matters to the arbitrators for reconsideration. (at p272)

8. The summons by which the present proceedings were instituted in the Supreme Court asked that the award be set aside. It did not seek as an alternative order that the award or some one or more of the matters the subject of the reference should be remitted to the arbitrators. But it is established by authorities both old and modern that upon an application to set aside an award it may be remitted: see Re Arbitration between Amos and Amos (1893) 14 NSWLR 295; Kiril Mischeff Ltd. v. Constant Smith & Co. (1950) 2 KB 616; and David Taylor & Son Ltd. v. Barnett Trading Co. (1953) 1 WLR 562, at pp 569 and 570, where the power to remit instead of setting aside the award was recognized but was not exercised. The Court of Appeal could have made an order for remission, although this was not sought in the summons. In my opinion, this Court may now make such an order if it appears to it to be proper to do so. The fact that the Supreme Court was not asked in the summons or at the hearing to make that order does not deprive this Court of power to make it, although in some circumstances that fact would provide a strong ground for saying that as a matter of discretion the Court ought not to exercise that power. (at p272)

9. In this appeal the respondent has submitted that if the Court should hold that an error of law was made which affected the award so far as it dealt with a particular claim the award should be remitted rather than wholly set aside. The appellant has not presented any argument that there is in the circumstances no power to take that course or that it ought not to be taken. It appears plainly to be the better course. But for some statements made in Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty. Ltd. [1968] HCA 3; (1968) 118 CLR 58, I should not have been concerned to add anything to the reasons given by Stephen J. for holding that the Court may and should adopt that course. I have done so because the observations in that case may appear to cast doubt upon the Court's power to do so. Kitto J. expressed(1968) 118 CLR, at p 68 the opinion that the Court should not take upon itself the jurisdiction, conferred by a provision of a Queensland statute similar to s. 12 of the Arbitration Act (N.S.W.), to remit the matter to the arbitrator for reconsideration. The reason his Honour gave was that no application under that provision was before the Supreme Court of Queensland in the proceedings out of which the appeal arose. I do not think that his Honour intended to state as a general proposition that that statutory power could never be exercised by this Court on appeal unless an application for its exercise had been made to the Supreme Court. What he said should be read, I think, as being directed to the circumstances of the matter which was then

before the Court. I think that the same view ought to be taken of what Barwick C.J. said (1968) 118 CLR, at p 66, at the end of his judgment. Menzies J. said (1968) 118 CLR, at p 75 that if the Court allowed an objection to be taken belatedly to a part of the award and upheld that objection the only course open would be to quash the whole award. If that statement was based upon the view that the award was not severable into two provisions but was an award for a single sum which could not be severed, it presents no obstacle to the taking in the present appeal of the course which Stephen J. has proposed. The formal award in that case was for a single sum and costs. It contained no reference to the elements of which that sum was made up. This is a feature of the award to which attention was directed by the Chief Justice(1968) 118 CLR, at p 62 and by Kitto J.(1968) 118 CLR, at p 68 It is a feature which is not, in my opinion, present in this case, in which in the formal award the arbitrators have dealt separately with distinct claims and have awarded specified money sums in respect of each of the claims. I am of opinion, therefore, that the reasons of their Honours in that case do not stand in the way of a conclusion that in the present appeal the award should not be quashed, but should be remitted for the further consideration of the matters specified in the judgment of Stephen J. (at p273)

10. I am of opinion that the appeal should be allowed and that orders should be made to give effect to what Stephen J. proposes. (at p273)

DECISION

GIBBS J. I have had the advantage of reading the reasons for judgment prepared by my brother Stephen and with one reservation am in agreement with them. Since I agree that cl. 9 of the conditions was not applicable to the builder's claim for extra costs incurred by reason of the delay in the diversion of the sewer, it is not necessary to consider whether, on the contrary assumption, the builder was entitled to succeed, and I express no opinion on that point. I would only add that I have no doubt that we have power to remit the award instead of setting it aside and that this would be the more appropriate course in the circumstances of the present case. I agree with the order proposed by my brother Stephen. (at p274)

STEPHEN J. By a contract made in February 1967 the respondent (the builder) contracted with the appellant (the proprietor) to demolish an existing building at Point Piper, Sydney, and to erect in its place a block of twelve flats and car parking facilities. This work was duly completed but differences arose between the parties and were submitted to arbitration in accordance with an arbitration clause contained in the contract. In July 1970 the arbitrators, after a quite protracted hearing, stated in the form of a special case for the opinion of the Supreme Court of New South Wales what they conceived to be questions of law arising in the course of the reference. This came before the Court of Appeal Division which in September 1970 answered such of the arbitrators' questions as it regarded as properly raising matters of law. (at p274)

2. On 18th November 1970, the arbitrators published their award in which they recited that they had had regard to the judgment of the Court and in which they expressed themselves as making findings in conformity with it. Those findings consisted of nine declarations as to the entitlements of the parties concerning the various matters in dispute, followed by seven distinct findings stating in money sums the consequences of these declarations ; the award concluded by awarding in favour of the builder almost $65,000, described as the net total of the amounts of specified findings ; costs and the expenses of the arbitration were also dealt with in the award. (at p274)

3. The proprietor then, in January 1971, issued a summons calling upon the builder to show cause

why this award should not be set aside for errors of law appearing on the face of the award ; this summons came before Isaacs J. who, in February 1971, dismissed it ; the proprietor then appealed to the Court of Appeal Division which, in March 1971, after rejecting a formal submission that its earlier judgment on the case stated was wrong in those respects in which it was adverse to the proprietor, dismissed the appeal. (at p275)

4. It is from that order of the Court that this appeal is now brought. The argument on this appeal was, in substance, concerned with the correctness of certain of the answers given by the Court of Appeal to questions of law raised by the case stated although it necessarily takes the form of an attack on the award for error on its face, it being contended that since, in three distinct respects, answers given by the Court of Appeal were erroneous in point of law, it follows that the award made in conformity with those answers should be set aside. (at p275)

5. The first of the three respects in which the award is said to be erroneous in law is that it places upon the proprietor the ultimate burden of amounts payable by the builder to the lift installation sub-contractor under a rise and fall clause in the sub-contract between that sub-contractor and the builder. The Court of Appeal held that the builder was entitled to be reimbursed that amount, together with a small percentage thereon, by the proprietor, and the latter now contends that, by giving effect to that view, the arbitrators have erred in law. (at p275)

6. Clause 21 (h) of the conditions annexed to the articles of agreement provides, so far as relevant, as follows :

> "21. Where prime cost or provisional sums are included in
> the Specification for persons to be nominated or selected by the
> Architect to supply and fix materials or to execute work on
> the site:
>
> . . .
>
> (h) In the event of the total amount properly expended in
> respect of prime cost or provisional items referred to in this
> clause exceeding the total amount included in the Specification,
> . . . the excess together with the Builder's remuneration of 2 1/2%
> upon such excess shall be added to the Contract Sum. In the
> event of the total amount so expended being less than the
> amount included in the Specification the difference shall be
> deducted from the Contract Sum." (at p275)

7. It was not in dispute that the lift contractor was a person "nominated or selected by the architect to supply and fix materials" within the meaning of cl. 21, that a prime cost or provisional sum of $15,000 was included in the specification for the delivery, supply and installation of the elevator and that the total amount expended in respect of the elevator item exceeded that sum of $15,000. The remaining ingredient required before cl. 21 (h) becomes applicable is that that total amount should be "properly" expended by the builder. (at p275)

8. On behalf of the builder, it was said, on the basis of the facts as found in the arbitrators' case stated, that the rise and fall clause in the elevator sub-contract formed part of that sub-contractor's

tender lodged with the architect in response to his call for tenders, which tender the architect directed the builder to accept. Thus, not only did the builder have no choice either in the selection of the sub-contractor or in the terms of the sub-contract, with its rise and fall clause included, but the architect must have been fully aware of the existence of that clause in the tender when he instructed the builder to accept the tender ; accordingly, neither the engagement of that sub-contractor nor the terms upon which it was so engaged were in any sense the doing of the builder. The expenditure by the builder of the total amount due to the sub-contractor, including amounts due as a result of the operation of the rise and fall clause contained in the sub-contract, could not therefore, the builder contended, be otherwise than "properly" expended by it within the meaning of cl. 21 (h). There was not only nothing improper about the expenditure, it was precisely what the proprietor should have contemplated would occur were prices to increase so as to bring into effect the sub-contractor's rise and fall clause. This, it was said, concluded the matter in favour of the builder. With these submissions I agree. (at p276)

9. Apart from reliance upon "properly" in cl. 21 (h) the proprietor also relied upon other provisions of the contract documents ; the tender was on the basis of a "firm lump sum" and was accepted on the footing of a specified total price "not subject to Rise and Fall" ; the articles of agreement repeated this reference and cl. A 1.07 of the specifications required the builder to bear increases in cost due to increased labour costs and the like. These provisions combined, it was said, to make it clear that it was for the builder to bear the risk of any increase in the cost of the lift installation due to the operation of the rise and fall clause in that sub-contract, if necessary including in its total tender figure an amount adequate to cover what it might then estimate to be any excess cost over the prime cost sum of $15,000. (at p276)

10. The Court of Appeal rejected this contention and was, I think, correct in doing so although I prefer to rely rather more upon the positive provisions of cl. 21 (h), which I regard as expressly dealing with the matter, than upon what their Honours regarded as the unreasonable position in which a contrary view would place the builder. (at p276)

11. The various provisions mentioned as relied upon by the proprietor are not necessarily inconsistent with the builder's claim. The terms of the tender and its acceptance are readily explicable as referring to the basis of the contract between the parties that the builder's price should not be increased by any subsequent increase in his own costs, and if the builder was to sub-contract portions of its work, any increase in sub-contractors' costs which it might become liable for would no doubt be for its account. A very different position arises in the case of sub-contracts containing rise and fall clauses into which the builder is directed by the architect to enter. The Court of Appeal's reference to what Lord Reid said in North West Metropolitan Regional Hospital Board v. T. A. Bickerton & Son Ltd. (1970) 1 All ER 1039, at p 1043; (1970) 1 WLR 607, at p 611 is apt in this regard. His Lordship said :

> "Subject to a very limited right to object, the principal
> contractor is bound to enter into a contract with the employers'
> nominee, but it has no concern with the terms of that contract,
> for those terms are settled by the employers and their nominee."

The terms of the articles of agreement relied upon are to be explained in the same way ; the very fact that the concept of prime cost items and provisional sums is employed is in itself significant. Lord Reid, somewhat earlier in his judgment (1970) 1 All ER, at p 1042 ; (1970) 1 WLR 607, at p 610 , said of the expression "prime cost sums" that its ordinary meaning was that of :

> " . . . sums entered or provided in the bills of quantities for
> work to be executed by nominated sub-contractors. Such sums
> are never expended ; they are only estimates of the sums which
> will later appear in the sub-contract between the contractor
> and nominated sub-contractors as the prices to be paid to the
> nominated sub-contractors for the prime cost work to be
> done by them." (at p277)

12. It would, I think, require a most clearly expressed provision, not to be found in the present set of documents, to overcome the inference that when a proprietor requires a builder to accept his estimate of the cost of an item by including p.c. items as a mandatory part of the tender, those p.c. amounts, which are only estimates made for the purpose of convenience, are inherently subject to adjustment when the true cost, over which the builder has no more control than he had over estimated cost, emerges in due course. (at p277)

13. That portion of cl. A 1.07 of the specifications particularly relied upon by the proprietor was as follows :

> "Claims by sub-contractors will not be considered relative
> to rise and fall. The Builder will pay all such claims and allow
> for this in his tender."

It is obscure in meaning and doubtful of function in a contract such as the present, which contains no rise and fall clause. However, the specifications are in a number of respects inconsistent with the other contract documents, perhaps because prepared some time before other contract documents assumed their final form. An example of this occurs in relation to this very matter of the elevator sub-contractor ; cl. K 1.01 contemplates that that sub-contractor shall be selected by the builder yet in fact the contract ultimately proceeded upon the footing of an elevator sub-contractor nominated by the proprietor's architect. In those circumstances undue weight in the interpretation of the contract should not be given to this clause of the specification ; its terms certainly do not suffice to modify what I regard as the clear provisions of cl. 21 (h) of the conditions. (at p278)

14. It is for the foregoing reasons that, in my view, the appellant must fail on its first point in this appeal. I find it unnecessary to determine whether in this instance the specifications have any contractual effect - see Cable (1956) Ltd v Hutcherson Bros Pty Ltd.(1969) [1969] HCA 37; 123 CLR 143 (at p278)

15. The second matter argued before this Court related to the builder's entitlement to interest on whatever amount was due in respect of two certificates, numbered 15 and 16, issued to the builder from the office of the proprietor's architect. The certificates were not signed by the architect but by a person authorized by him to sign on his behalf during his absence from Australia, and it was contended by the proprietor that this deprived them of the character of architect's certificates and that accordingly the builder was not entitled, as he otherwise would be, under cl. 25 (i) of the conditions, to interest on moneys certified for by the architect and which the proprietor had delayed in paying. (at p278)

16. The builder claimed interest under cl. 25 (i) ; alternatively, it contended that if the certificates were not architect's certificates, there had been a neglect by the architect to issue certificates falling

within cl. 20 (2) which gave rise to an entitlement to interest. The relevant parts of cll. 20 (2) and 25 (i) are as follows :

> "20. (2) If the Architect shall refuse or neglect to issue any certificate during the progress of the Works for a period of ten days after the same shall have become due and shall have been requested in writing by the Builder, the Builder shall be entitled to interest on the sum to which he has become entitled at the percentage rate per annum stated in the Appendix from the date upon which the certificate should have been issued . . .
> 25. (i) If the Proprietor shall refuse or neglect to pay the amount of any certificate given by the Architect under this clause for a period of ten days after the same shall have been presented to him by the Builder, the Builder shall be entitled to interest on the sum to which he has become entitled, at the percentage rate per annum stated in the Appendix from the date of such certificate until the date of payment." (at p279)

17. The proprietor met the builder's contention by asserting that for cl. 20 (2) to operate, it required a written request for a certificate made after the architect's failure to issue one ; there had here been only one written request, made before any such failure, and, in the absence of a second subsequent request, no entitlement to interest arose under cl. 20 (2). (at p279)

18. The Court of Appeal, without deciding whether the certificates were properly to be regarded as architect's certificates for the purpose of cl. 25 (i), found the builder entitled to interest under cl. 20 (2) because the original request, if not duly complied with, thereafter had a continuing operation so as to satisfy the requirements of cl. 20 (2). The relevant question asked in the case stated was answered accordingly, and the arbitrators in their award then proceeded to award a substantial amount of interest to the builder under cl. 20 (2). (at p279)

19. Assuming, for present purposes, in favour of the proprietor, that the alleged certificates were not such as to entitle the builder to interest under cl. 25 (i), I consider the builder to be entitled to interest under the terms of cl. 20 (2) not because the original, and only, written request for a certificate had a continuing effect, but rather because I regard the effect of the two clauses when read together as requiring only one request which, if not complied with, entitles the builder, if he be otherwise entitled to a certificate, to interest as against the proprietor. (at p279)

20. The words of cl. 20 (2) contemplate a temporal sequence, first the event of a certificate becoming due, then a written request for the certificate made by the builder. They do not, of themselves, suggest that the first event, the certificate becoming due, involves any prior written request by the builder, rather the contrary, and this impression is, I think, borne out by the terms of cl. 25 (a). In that clause, the entitlement to a certificate arises once the architect's computed value, less the value already represented by prior certificates, amounts to the specified "value of work for progress payment". At that stage the builder has earned an entitlement to a progress payment by performing work of a certain value in addition to work already paid for ; he becomes entitled to an interim certificate ; this he must apply for in writing but it appears to me to be a not inappropriate use of language to describe the certificate as "becoming due" as soon as the value of uncertified work reaches the "value of work for progress payment". So interpreted, cl. 25 (i) accords with the

wording of cl. 20 (2), and the contract between the parties does not then produce the consequence contended for by the appellant that when an architect has wrongly ignored or rejected a proper request in writing for a certificate the injured party cannot obtain the partial remedy of interest until a second, and presumably identical, request in writing is made to the architect. The fact that interest under cl. 20 (2) runs from the date when the certificate should have been issued, that is, on any view, after only one written request has been made to the architect, tends to support this interpretation of these clauses. (at p280)

21. In fact, in the present case, the appendix to the conditions does not specify a "value of work for progress payments" but instead reads "monthly as determined by the architect". However, this does not, in my view, affect the position. (at p280)

22. In these circumstances, I consider that the answer given by the Court of Appeal was correct and that no error of law is disclosed in that part of the award whereby interest is awarded to the builder under cl. 20 (2). (at p280)

23. The third matter the subject of this appeal is described in the judgment of the Court of Appeal as a claim for additional costs incurred by the builder by reason of the non-diversion of the sewer at the outset of the job. (at p280)

24. The relevant facts are that the building contract provided for the demolition of an existing dwelling and the erection of two distinct buildings, a block of flats, and, alongside it, a car park building. The site was sloping and required extensive excavation. An existing sewer line ran under the proposed site of the car park building and was to be replaced by a new sewer line in a position clear of the site of that building. The articles of agreement defined "the works" which the builder was to perform by reference to what was "shown upon the contract drawings and described by or referred to in" the specification and conditions. (at p280)

25. Relevant legislation in New South Wales forbids interference with sewer lines without approval of, in this instance, the Metropolitan Water Sewerage and Drainage Board, and although some passages in the contract documents seem to envisage that the builder would itself undertake re-location of the sewer line, it was, in fact, the Board, in accordance with its usual practice, that undertook that work of re-location. The proprietor and not the builder paid the Board its charges for undertaking this work and this the parties appear to have regarded as appropriate at all times, despite express statements in the contract documents that the builder should provide for and include in its tender price the Board's charges for re-location ; these are, moreover, contradicted by a note indorsed on one of the contract drawings which refers to the proprietor's responsibility for the Board's charges, the obligation of the builder being to accept responsibility for the protection and maintenance of the sewerage service for the duration of the work. (at p281)

26. The specifications provided, by par. A 1.14, for the order of work and stated that the contract should be carried out in a particular order, three broad classifications of work being stated to follow each other, of which the first was "Demolition and Sewer Diversion", to be followed by "Site levelling and preparation" and, finally, "Building works over the whole area". (at p281)

27. In fact, the Board took much longer than the parties had anticipated in determining upon the re-located route of the sewer line and in installing the sewer along that new route. Excavation work necessary to prepare the site for the erection of the car park had proceeded to a sufficient depth to uncover the old sewer before the re-location route was determined by the Board ; until re-location

was completed some months later, the old sewer had to be shored up so as to support it in working order. The result of this was that further excavation of the car park site was delayed although work on the flat building continued unaffected ; thus it was that the builder came to proceed in an order of work other than the order provided for in specification cl. A 1.14 and did so, as the arbitrators found, on account of the delay "in relocating the sewer line". Moreover, the period during which the existing sewer line had to be supported where it was exposed on the site of the car park was much prolonged ; both of these factors, the arbitrators found, increased the builder's cost of executing the works. (at p281)

28. The arbitrators, after setting out in the case stated a series of findings of fact, asked of the Court a number of questions thought by them to bear on this matter, of which the Court of Appeal answered only three ; these were whether :

> "(i) The builder is entitled to payment of any losses or expenses associated with the delay in completion of the said works occasioned by the preservation on site of the existing sewer line ?
>
> (ii) So far as the builder was put to expense in maintaining the existing sewer line by shoring and the like it is entitled to payment of such expenses ?

(iii) The proprietor was obliged to ensure that the sewer diversion would be carried out in accordance with the

'Order of Works' ?"

The Court of Appeal answered each of these three questions by a simple affirmative. (at p281)

29. The arbitrators, when making their award, and having recited that they did so "in conformity with the said Judgment of the Supreme Court ", found (inter alia) :

> " 7. That the Builder is entitles to payment of losses or expenses associated with delay in completion of the said Works occasioned by the preservation on site of an existing sewer line and
>
> 8. That the Builder is entitles to expenses to which he was put in maintaining the existing sewer line and
>
> 9. That it was an obligation of the Proprietor to ensure that diversion of the sewer line would be carried out in accordance with Builder's Order of Works . . . "

They then found that the builder was entitled to $15,662 "by virtue of our seventh finding" and $2,649.98 "by virtue of our eighth finding ". (at p282)

30. As I understand it the Court of Appeal reached its conclusions, which lead to the answers it gave to the arbitrators' three questions, by two steps. It first held that there was an implied obligation imposed upon the proprietor to ensure that sewerage diversion would be executed by the Board at

such a time as would enable the contract to be performed by the builder according to its terms ; this obligation it found to be implied from the note on the contract drawing already referred to, read together with the provision of the specification as to order of work. Re-location of the sewer was, in the Court's view, the proprietor's direct responsibility and it noted the arbitrators' finding that delay in executing that diversion delayed the builder's own work and put it to additional expense. (at p282)

31. That constitutes what I have described as the first step taken by the Court of Appeal. It was one which the respondent on this appeal did not seek to support ; indeed it disavowed, correctly, I think, the existence of any obligation on the part of the proprietor to ensure the timeous execution of the sewerage diversion ; instead it relied exclusively upon what I describe as the Court of Appeal's second step. This second step was to treat what was described as "the instruction of the architect that the builder continue with the works before the sewer diversion was carried out" as a variation within the meaning of cl. 9 of the conditions. The Court referred to the arbitrators' finding that that variation, if it truly was one, was sanctioned by the architect and authorized by him and held that the necessity for that variation arose because the original contract became impossible of performance according to its terms as a result of a failure on the part of the proprietor to carry out his obligation in relation to the sewer diversion. It held that the builder was not only bound, but was also entitled, to carry out the contract in accordance with the specified order of work ; it also held that cl. 9 was not confined to variations arising from written instructions or other requirements of the architect pursuant to cl. 1 and that the proprietor's failure to procure timeous re-location of the sewer therefore lead to a variation in performance of the contract on the builder's part which was authorized and sanctioned by the architect ; that variation, it held, should be valued and the resultant sum added to the contract sum. (at p283)

32. In my view, the award of any amount to the builder in respect of this third claim is erroneous in law. (at p283)

33. In view of the abandonment by counsel for the respondent of the contention that the proprietor was under any implied obligation as to re-location of the sewer line, which was the first step in the Court of Appeal's judgment, I say only that I regard this concession as entirely proper ; the material before the Court does not appear to me to justify any implication of responsibility on the part of the proprietor in this regard. (at p283)

34. In considering the Court of Appeal's second step one may begin by taking the position with which the builder was faced when it encountered the Board's delay in re-location of the sewer. This was a situation for which neither party was responsible, yet it was causing loss to the builder. The builder determined in those circumstances, and no doubt for reasons which appeared good to it, to depart from the specified order of work and the architect, according to the findings of the arbitrators, did not insist upon the order of work being observed but, on the contrary, acceded to the change in the order of work involved in proceeding with work on the site of the flat building while deferring work on the site of the car park. (at p283)

35. The consequence of the architect doing so has been held to be, as a result of the inter-action of the Court of Appeal's answers to questions in the case stated and the arbitrators' subsequent award, that the proprietor is liable for what are said to be the resultant losses and expenses incurred by the builder. Thus, although the respondent does not now seek to hold the proprietor responsible for the Board's delay in re-locating the sewer line, it nevertheless has obtained and seeks to uphold an award in its favour under which it recovers from the proprietor the amount of loss and expense

incurred by it, the builder, and attributable initially to that very delay which would have occurred had all further work been held up pending the re-location of the sewer. (at p283)

36. There is, in my view, more than one reason why this part of the arbitrators' award should not be permitted to stand.(at p283)

37. Clause 9 of the conditions reads as follows :

> " 9. No variation shall vitiate the contract, but unless a price therefor shall have previously been agreed, all variations authorised or sanctioned by the Architect shall be valued and the sum involved shall be added to or deducted from the contract sum as the case may be.
>
> In ascertaining such value measurements and assessments shall be made and supplied by the Builder to the Architect. If the Architect is not satisfied therewith, he may make measurements himself or cause such measurements to be made by a Quantity Surveyor and shall supply the same to the Builder and any fees to be paid for any such measurements shall be added to the Contract Sum. The valuation of such variations unless previously or otherwise agreed shall be made as far as possible in accordance with the following rules :
>
> (a) The priced Bill of Quantities or, if no such Bill of Quantities has been provided appropriate current rates shall determine the value of any variation to which such rates may reasonably apply.
>
> (b) Where there are no appropriate current rates a fair valuation of the variation according to the measurements adopted by the Architect shall be made.
>
> (c) If in the opinion of the Architect the valuation of the variations cannot be ascertained by either of the above methods the Builder upon notification to that effect shall proceed with the Works and shall present in such form as the Architect may direct a correct record of the cost of the variations together with evidence supporting the same. The Builder shall not be entitled to any discount on materials other than discount for prompt payment.
>
> Any certificate issued to the Builder by the Architect pursuant to this clause shall include reasonable allowance for overhead and profit." (at p284)

38. In my view cl. 9 does not concern itself with the case of any increased cost to the builder of

doing the contract work or supplying the contract materials and which is said to flow from delays or difficulties encountered in the course of construction ; such a situation is only dealt with, in certain circumstances, in cl. 1(e) of the conditions, to which I will later return. (at p284)

39. The theme running through the whole of cl. 9 is that of valuation ; its first paragraph calls for the valuation of variations by the architect, followed by alteration to the contract sum. Its second paragraph then provides for the machinery applicable to that task of valuation ; the builder is to make and supply measurements and assessments to the architect who may accept them or may, if not satisfied with them, take his own measurements or cause them to be taken by a quantity surveyor. This latter provision clearly contemplates that what is involved in valuation is the measurement of tangible things capable of measurement by an outside expert brought in for the purpose. There then follow, as part of this second paragraph, three sub-paragraphs providing rules to be applied, so far as possible, in the process of valuation ; the first rule calls for the application of certain specified rates to a variation and this necessarily implies measured quantities to which rates can be so applied ; the second rule operates in the absence of any appropriate rates and the architect is to make a fair valuation "according to the measurements" which he has adopted, that is, one or other of the sets of measurements referred to at the beginning of this second paragraph of cl.9. The third rule applies where the architect concludes that the two preceding rules cannot be applied, in which case the works are to be proceeded with and the builder is to present to the architect "a correct record of the cost of the variations". (at p285)

40. The respondent necessarily sought to rely upon the third rule, in sub-cl. (c), in submitting that cl. 9 was applicable to a claim for increased costs due to delays and change of sequence ; he had to do so because there was no work nor any materials which could be measured or to which a value could be assigned and which was additional to the work or materials which he was at all times obliged to undertake and supply under the contract. But sub-cl. (c) is no more than a rule to be applied as a part of the architect's task of ascertaining a value, a task which involves measurements and valuation, as the opening sentence of the second paragraph emphasizes. Sub-clause (c) is not a charter to the architect, empowering him to fix an amount as fair compensation to the builder for additional expense which the latter may incur in performing work or supplying materials originally specified ; the concluding provision of cl. 9 supports this conclusion. It deals with what will follow the valuation of a variation by the architect, namely the issue of a certificate, and provides that such a certificate is to include reasonable allowance for overhead and profit. This appears inappropriate in the case of a claim for compensation for loss or expense due to delay but entirely appropriate when the quantity of work done or material supplied has been altered from that contracted for and which was to be rewarded by the agreed contract sum, with its built-in allowance for both overhead and profit. (at p285)

41. It is useful to compare cl. 9 with the terms of cl. 1 (e) which reads as follows :

> "If compliance with Architect's Instructions involves the Builder in loss or expense beyond that provided for in or reasonably contemplated by this contract, then unless such instructions were issued by reason of some breach of this contract by the Builder, the amount of such loss or expense shall be ascertained by the Architect and shall be added to the Contract Sum."

This sub-clause is expressly aimed at compensating the builder for loss due to matters unforeseen at

the time of the making of the contract, and when the draftsman directs himself to this task he does not refer to valuation or to measurements and is not concerned with the issue of certificates or with allowance for overhead and profit. Instead the architect is given the task of ascertaining the amount of loss or expense in which the builder has been involved beyond that provided for in or contemplated by the contract ; the amount so ascertained is to be added to the contract sum. The present claim might readily enough fall within cl. 1 (e) had there been an architect's instruction, as defined in cl. 1 (a). The contrast between its terms and those of cl. 9 emphasizes the inapplicability of cl. 9 in the present case. (at p286)

42. If cl. 9 is, as I think, not applicable to the present claim it follows that there is no provision of the contract documents which entitles the builder to recover from the proprietor the amounts awarded by the arbitrators by virtue of their seventh and eighth findings and quantified later in their award and that portion of their award is revealed as being wrong in law. (at p286)

43. Even if, contrary to my view, cl. 9 can be applied to a claim for losses and expenses, there is a further reason why the appellant should succeed on this aspect of the appeal. I regard the award as erroneously attributing to the sanctioned change in the order of work the delay incurred by the builder, with its consequences of additional loss. Without that process of attribution there can be no entitlement to payment on the part of the builder since cl. 9 depends upon the existence of a variation to be valued and the changed order of work alone provides such a variation, to which cl. 9's process of valuation can then be sought to be applied. (at p286)

44. I describe that attribution as erroneous because it is in conflict with the arbitrators' findings of fact. (at p286)

45. Paragraph F. 1 of the arbitrators' case stated refers to "additional costs incurred" by the builder by reason of the non-diversion of the sewer at the outset of the job ; par. F14 contains a finding that delay in re-location of the sewer caused delay in excavation and the need to support the exposed sewer line by strutting and shoring, thereby increasing the builder's costs of executing the works ; by par. F.15 it is found that progress on the car park was affected by the delay in re-location, thereby increasing the builder's costs, and that due to delay in re-location, the flat building proceeded independently of the car park ; finally par. F16 contains the finding that in consequence of the foregoing the builder proceeded in an order of work other than that specified on account of the delay in re-location. (at p287)

46. It will be seen that delay in re-location of the sewer is througout assigned as the cause of other delays, of increased costs and of the adoption of a changed order of work ; this is not departed from either in the arbitrators' questions in the case stated or in the Court of Appeal's statement of what it regarded as the relevant question of fact found by the arbitrators. But the Court then formulated what it described as the only question of law which could be determined on the case stated, namely :

> " . . . whether the additional cost of executing the works,
> as found by the Arbitrators, is recoverable because it arose
> from the variation brought about by the architect's verbal
> instruction that the work be continued and carried out in an
> order other than the order provided for in the contract".

As I understand it, the arbitrators did not conclude that the additional cost arose from the variation, that is, the change in the order of work, but rather that the cause both of the additional cost and of

the need for a change in the order of works was the delay in re-location of the sewer. It follows that the Court of Appeal has proceeded upon a factual basis different from that found by the arbitrators, regarding the change in the order of work as the cause of additional cost instead of it being, together with the additional costs, a consequence forced upon the builder by the delay in sewer re-location. (at p287)

47. It was only by this process that, as I understand the judgment, it was concluded that, because the change in order of work could be regarded as a duly sanctioned variation, cl. 9 could appropriately be applied in valuing the losses of the builder as if those losses flowed from that change in the order of work. From this followed the answers given by the Court to the arbitrators' questions, which in turn formed the basis of the relevant portions of the arbitrators' award. (at p287)

48. On the facts as found by the arbitrators it appears clearly enough that the altered order of work was not itself a cause of delay or of loss to the builder but was, rather, a step taken by the builder to mitigate as best it could the consequences of delay in sewer relocation, a step in which the architect very naturally concurred. So viewed, there can be nothing to value under cl. 9 when the altered order of work is treated as a sanctioned variation, since it was not itself a cause of loss but was, rather, a partly successful step taken to avoid loss. The valuation of a variation under cl. 9 can only be applied to losses caused by the variation and not, as in the present case, to those caused by delay in sewer re-location and which still persist in part, despite the mitigating effect of the variation. The change in order of work was not even a link in the chain of causation ; it was no more than an act of partial mitigation. (at p288)

49. I accordingly conclude that the findings contained in pars. 7 and 8 of the award, which do no more than give effect to the first two of the three answers given by the Court of Appeal to the case stated, are wrong in law as is the finding in par. 9, which was not sought to be supported by the respondent on this appeal. Paragraphs 7 and 8 are given effect to in pars. 12 and 13 of the award which quantify the amounts referred to in the earlier paragraphs. These too, accordingly, are wrong in law. (at p288)

50. In dealing with the matter in the way I have I am conscious of the need to restrict to the face of the award the process of discernment of error but consider that I have not trespassed beyond those limits ; the award itself refers to the Court of Appeal's judgment, in conformity with which the award is made, and to the case stated, which is in turn discussed at length in the Court's joint reasons for judgment which are expressly referred to in the Court's formal judgment. In Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty. Ltd.(1968) [1968] HCA 3; 118 CLR 58, at p 67, Kitto J. said that if an arbitrator referred in his award to some other document as setting forth the considerations upon which the arbitrator based his decision the two documents would have to be considered as together constituting the award ; Menzies J.(1968) 118 CLR, at p 72, adopted a not dissimilar approach, as did Windeyer J. (1968) 118 CLR, at pp 76-77. The Chief Justice, dissenting, (1968) 118 CLR, at pp 63, 65 said that examinable error of law must be such that ex facie the award is founded upon it ; it was not for the court to seek out opportunities to correct errors of law now that it was open to the parties to require, and to the arbitrator of his own motion to seek, the court's opinion on matters of law. Since in the present case the award is expressed to be founded upon the Court's opinion, sought by the arbitrators, the position is quite different from that which his Honour was there considering. (at p288)

51. Accordingly, reference to the formal judgment of the Court of Appeal appears to me to be clearly permissible and, in turn, so is reference to the Court's reasons for judgment and to the

arbitrators' case stated. In British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London, Ltd. (1912) AC 673, their Lordships treated as examinable error on the face of the award a error of law contained in the opinion expressed by a Divisional Court in an answer to a question asked in a case stated by the arbitrator and they set aside the award accordingly. In that case the award had annexed to it the case stated and the Divisional Court's answers to the question asked ; however, I consider that the form of the relevant documents here in question justify a similar course in the present case. (at p289)

52. There remains the question of what is the appropriate order on this appeal. Although the award concludes by awarding a total sum to the respondent it goes on to describe that sum as being the total of the amounts under various specified findings, including the findings in pars. 12 and 13. There are, therefore, in effect, a number of quite distinct money sums awarded which the arbitrators have totalled, but without thereby depriving each item of its own distinct identity. I see no obstacle to severing the good from the bad, a course adverted to by Kitto J. in the Gold Coast Case where his Honour said(1968) 118 CLR, at p 68:

> "Of course where an award contains several operative provisions which are in their nature severable from one another, the invalidity of some of those provisions does not necessarily infect the others. The English authorities on this proposition, from Storke v. De Smeth(1737) Willes 66 (125 ER 1059) onwards, may be found in Russell on Arbitration, 17th ed. (1963), pp. 347-349, and a reference may be added to In re Bailey and Hart (1883) 9 VLR (L) 311, at p 317 Where provisions that are bad are severable from others that are good the course usually followed is to dismiss the proceedings to set aside the award, leaving the bad provisions to be ignored as simply void."

The course there referred to can, however, scarcely be followed in this case where the substantial award of costs by the arbitrators in favour of the builder may well be thought by them to be inappropriate in its terms if in the outcome the builder is found to fail on the items of claim relating to sewer re-location. (at p289)

53. In the Gold Coast Case(1968) [1968] HCA 3; 118 CLR 58 Windeyer J. was of the view that good parts of an award were severable from bad and he said that it was permissible, under Queensland legislation not materially different from s. 12 (i) of the Arbitration Act, 1902-1957, to remit the award to the arbitrator, to be amended by his eliminating from the sum awarded so much as was erroneously included therein as interest. (at p289)

54. Where, as here, and unlike the Gold Coast Case [1968] HCA 3; (1968) 118 CLR 58, the award contains a number of quite separate findings, it appears to fall directly within the scope of s. 12 (i), which empowers remission of "the matters referred, or any of them, to the re-consideration of the arbitrators . . . " There should, in my view, be a remission to the arbitrators of findings 7, 8, 9, 12 and 13 and of that portion of the award relating to costs. (at p290)

55. The power to remit conferred by s. 12 (i) is a wide discretionary power - Russell on Arbitration, 18th ed. (1970), p. 350 - and its exercise was described by Parker L.J. in Universal Cargo Carriers Corp. v. Citati (1957) 3 All ER 234, at p 238 as wholly unfettered, its exercise depending on the

exact facts in each case. The choice between that course and the setting aside of an award is also a matter of discretion - Eastcheap Dried Fruit Co. v. N. V. Gebroeders Catz Handelsvereeniging (1962) 1 Lloyd's Rep 283, at p 284. Here, in my view, the correct course is clearly to remit, thereby preserving to the parties the effective determination by the arbitrators of those numerous items of dispute which are unblemished by error of law, a consideration adverted to by Devlin J. in Kiril Mischeff v. Constant Smith & Co. (1950) 2 KB 616, at p 622 and by the authorities there cited by him. Justice to the parties appears to me to call clearly for remission rather than setting aside, there being nothing whatever to suggest that the arbitrators will not satisfactorily deal with the matter in accordance with the judgment of this Court if remitted to them. (at p290)

56. This was the course adopted by their Lordships in the British Westinghouse Case (1912) AC 673 although there the whole of the award was remitted since it was held that both of the two questions of law asked of the Divisional Court had been wrongly answered by it and the award was remitted, a declaration setting out the correct answers to those questions being made. A like course should be followed in this case. (at p290)

ORDER

I would accordingly allow this appeal to the extent indicated above

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