Privy Council Appeal No. 35 *of* 1978

The University of New South Wales – – – – – *Appellants*

v.

Max Cooper & Sons Pty. Limited – – – – – *Respondents*

from

THE SUPREME COURT OF NEW SOUTH WALES (COMMON LAW DIVISION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER, 1979

Present at the Hearing:

LORD DIPLOCK
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD SCARMAN
SIR CLIFFORD RICHMOND

[*Delivered by* LORD DIPLOCK]

This is an appeal from an order of the Supreme Court of New South Wales (Sheppard J.) dismissing an application by the appellants ("the University") to set aside for error of law upon its face an award of $20,562 made against them by arbitrators in a dispute arising under a building contract made between the University and the respondents ("the Builders").

As is narrated in the award itself a question of law as to the true construction of the contract had previously arisen in the course of the reference. It was made the subject of a special case stated by the arbitrators for the opinion of the Supreme Court under s.19 of the Arbitration Act, 1902. In the Supreme Court the question was answered by the Common Law Division (Collins J.) in one way, which was in favour of the University; but by the Court of Appeal (Hutley and Glass JJ.A; Hope J.A. dissenting) it was answered by the majority in the oppposite way, which was in favour of the Builders. The University were dissatisfied with this answer, but since it was only an advisory opinion of the Supreme Court no further appeal to any higher court was open to them; *Minister for Works for the Government of Western Australia v. Civil and Civic Pty. Ltd.* (1967) 116 C.L.R. 273. The stated case was, accordingly, remitted to the arbitrators with the Court of Appeal's answer to the question of law that had been asked; the arbitration proceeded and in due course the arbitrators issued their award.

So far as is relevant to this appeal, the award was in the following terms, save only that the division into lettered paragraphs for convenience of reference has been inserted by their Lordships:—

(*a*) "This arbitration coming on to be heard before us the undersigned Harry Oswald Hall and Geoffrey Lawrence Lumsdaine sitting as joint arbitrators on 23/2/76, 24/2/76 and 13/3/78 WHEN Mr. V. Bruce of Counsel appeared for the builder and Mr. A. B. Shand of Queen's Counsel and with him Mr. D. I. Cassidy appeared for the proprietor.

(*b*) AND UPON READING the points of claim of the builder and the points of defence of the proprietor as amended.

(*c*) AND questions of law having arisen as to the right of the builder upon a proper consideration of the provisions of the contract between the parties in relation to facts that had happened in performance of the said contract to be reimbursed for loss or expense incurred by the builder in respect of otherwise unrecovered increased costs of such performance.

(*d*) AND we having stated a case for the opinion of the Supreme Court upon the said questions of law.

(*e*) AND the matter having been decided by the Court of Appeal upon appeal from the Supreme Court wherein it was stated as the opinion of the Court of Appeal that the builder was entitled to recover from the proprietor for loss or expense by reason of increased wages resulting from delay.

(*f*) AND the Court remitted the stated case to us with that expression of opinion.

(*g*) AND HAVING HEARD AND CONSIDERED the evidence adduced on behalf of the respective parties.

(*h*) AND what was alleged by Counsel.

(*i*) WE FIND that the builder is entitled to recover in respect of the provisions of the contract the subject of the said stated case the sum of Twenty thousand five hundred and sixty-two dollars ($20,562.00).

(*j*) We accordingly award that the Proprietor pay to the Builder the said sum of . . . . . $20,562 in satisfaction and discharge of all monies claimed by the Builder in this Arbitration".

The avowed object of the University's application to the Supreme Court to set this award aside for error of law upon its face was as a first step in a progress towards a court superior to the Supreme Court (Court of Appeal) in which it would be open to them to argue that the Court of Appeal's opinion on the question of construction of the contract that had formed the subject of the special case was wrong; and so to obtain for the University by indirection what in effect would be a right of appeal from that court's advisory opinion given under s.19 of the Arbitration Act, 1902, which the section itself denied them.

At the hearing of the University's application to the Supreme Court to set aside the award, Sheppard J. came to the conclusion, though not without some doubt, that the stated case, the opinion of the Court of Appeal on the questions of law posed to it, and the reasons given by the majority of the Court of Appeal for that opinion, were sufficiently incorporated in the award as to form a part of it that sets out the arbitrators' legal reasons for making the finding that they did. Having decided that he was bound so to treat these documents and to determine whether the reasons given by the Court of Appeal for their opinion disclosed any error of law, he applied the doctrine of *stare decisis* and treated himself as bound, in comity even if not in strict law, by the majority decision of the Court of Appeal as to the relevant law. He accordingly dismissed the application on this ground.

One of the principal attractions of arbitration as a means of resolving disputes arising out of business transactions is that finality can be obtained without publicity or unnecessary formality by submitting the dispute to a decision maker of the parties' own choice. From the arbitrator's award there is no appeal as of right; it is only exceptionally that it does not put an end to the dispute. England and those other Commonwealth jurisdictions, including New South Wales, whose arbitration statutes have followed the English model are exceptional when compared with most other countries, in providing procedural means whereby the finality of an arbitrator's award may be upset if it can be demonstrated to a court of law that his decision

resulted from his applying faulty legal reasoning to the facts as he found them. Two of these procedural means, the statement by the arbitrator of his award or of a question of law in the form of a special case for the opinion of the court, are statutory in origin; the third, setting aside an arbitrator's award for error of law upon its face, originated in the common law. It is as the result of an anomaly of legal history that it still survives in New South Wales and, until the passing of the Arbitration Act 1979, survived in England.

Before the Common Law Procedure Act 1854 the Court of King's Bench exercised over awards of arbitrators a supervisory jurisdiction to set aside the award for errors of law apparent upon its face, analogous to that which it asserted over inferior tribunals by use of the prerogative writ of *certiorari*. It treated the award itself as corresponding to the "record" of an inferior tribunal which alone was examinable for the purpose of detecting errors of law. This jurisdiction operated haphazardly because the ability of the court to exercise it depended upon whether or not the arbitrator had chosen to set out in the award itself the legal reasoning on which he had based it. If he had not, the court was powerless to intervene, but if he had and his legal reasoning so set out in the award itself was erroneous, the court could quash the award.

The Common Law Procedure Act 1854 for the first time empowered arbitrators to state their award in the form of a special case for the opinion of the court. This procedure enabled judgment to be entered on the award in accordance with the opinion of the court instead of the court's quashing the award and making it necessary to obtain a fresh award from the arbitrator. The Act, however, left it optional to the arbitrator whether or not to make use of this new procedure. It was not until the passing of s.19 of the English Arbitration Act 1889 that the court was given power to compel an arbitrator to state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. This provision is in the same terms as s.19 of the New South Wales Arbitration Act, 1902.

Shortly after the passing of the Common Law Procedure Act 1854 it was held by the Court of Common Pleas in *Hodgkinson v. Fernie* (1857) 3 C.B. (N.S.) 189 that the jurisdiction possessed by the court at common law to set aside an arbitrator's award for error of law upon its face had survived intact the creation of the new procedure for stating an award in the form of a special case. It is Williams J., a member of the court, who is generally quoted as having stated his regret at the continued existence of this jurisdiction. Viewed in the perspective of legal history it may be that even greater weight is to be attached to the opinion of the junior member of that court, Willes J., who, in expressing his regret at this exception to the general rule that the court could not interfere with the decisions of arbitrators, added

> "I do not say that my reason assents to that exception".

Despite the grant by the Act of 1889 of a discretion to the court to compel an arbitrator to state in the form of a special case for its opinion a question of law arising in the course of the reference whenever it thinks this course to be appropriate in the interests of justice, decisions in England and Australia, subsequent to this Act and the corresponding Acts in the Australian States, have shown that the jursidiction to set aside an award for error of law upon its face, a jurisdiction which the court has no discretion to refuse to exercise, has continued to be available, even in cases where in the course of the reference an advisory opinion on a question of law has already been obtained from the High Court under s.19 of the English Act (*British Westinghouse v. Underground Electric Railways* [1912] A.C. 673), or from the Supreme Court under s.19 of the New South Wales Act (*Tuta Products v. Hutcherson Bros.* (1971/2) 127 C.L.R. 253), and the arbitrator has adopted that court's reasoning as his own and has incorporated it in his award as constituting the grounds of his decision.

Unless an arbitrator is required under s. 19 of the New South Wales Act to state in the form of a special case for the opinion of the court a question of law arising in the course of the reference, he is not under any obligation in law to give his reasons for what he has decided. Indeed, to do so in the award itself may undermine its finality by exposing the party in whose favour it is given to the risk of the expense and delay involved in what in effect is an appeal on a point of law from his decision that may be taken as far as the highest court in the land, and the possibility that at the end of it all, the award may be set aside and a new reference held. On the other hand if he wants to inform the parties of his reasons without making the award vulnerable, all he has to do is to put them down on a separate piece of paper which he makes it unequivocally clear is not intended to form part of his award.

The expense and inconvenience of incorporating in an arbitrator's award a statement of the legal reasoning that he has applied, is compounded where, as in the instant case, the parties have already obtained a ruling from the Supreme Court not only at first instance but also on appeal as to the applicable law. As a matter of common sense it may be presumed that the arbitrator in making his award intended to apply the law as he has understood it to have been laid down by the Supreme Court in its opinion, whether or not he states in the award itself that he has done so. Their Lordships do but echo Willes J. in saying that they cannot discern any rational basis, as distinct from an accident of legal history, on which to make the finality of the award still dependent upon the arbitrator's having refrained from incorporating such a statement in his award. Whether he has or not is a pure question of construction of the award itself, for to make it vulnerable what the error is must appear upon its face as a matter of actual exposition, not one of inference only. In their Lordships' view, if there be ambiguity in the terms of an award the court should lean in favour of a construction which does not involve treating it as intended in itself to expose to everyone who reads it the actual process of legal reasoning by which the arbitrator arrived at his decision.

The question of construction generally arises in the form of a question as to whether another document (or some part of it) that is mentioned in the award, or was issued by the arbitrator simultaneously with it, is to be treated as forming part of the award itself so as to entitle and require the court to examine it to see if, when read together with the award, between them, they set out in express terms a proposition of law that is erroneous and which forms the basis of the award. Like all questions of construction of written instruments the problem is to ascertain from the words he used the intention of the author, in this case the arbitrator who may be presumed to know the vulnerability with which the award will be infected if he incorporates as part of it the legal reasoning upon which it is based. That the dividing line may be a fine one is apparent from the cases which have been held to fall on one side of it or the other. They are conveniently reviewed up to 1963 in *Giacomo Costa Fu Andrea v. British Italian Trading Co.* [1963] 1 Q.B. 201.

In the instant case, the structure of the award is that paragraphs (*a*) to (*h*) contain a narrative of the history of the proceedings, paragraph (*i*) contains the arbitrators' finding and paragraph (*j*) their award consequent on that finding. In some of the narrative paragraphs mention is made of a number of documents; the pleadings in the arbitration, the contract between the parties, the case stated for the opinion of the Supreme Court, and the opinion of the Court of Appeal. In addition there are references to the evidence adduced, which may or may not have included other documents, and to the oral arguments of counsel. Up to this point in the award the language used is that of historical narrative rather than that of ratiocination; there is nothing in these paragraphs to suggest that the arbitrators intended thereby to expound to the reader of them the actual reasoning on which their finding contained in the succeeding paragraph (*i*) was based or to do anything more than to give an objective account of what had happened in the reference

leading up to the award. The finding itself in paragraph (*i*) pointedly refrains from saying (as the corresponding finding in the *Tuta Products* case had done) that it was made in conformity with the judgment of the Court of Appeal on the case stated. It would not be inconsistent with anything that is said in the award, if the arbitrators had in fact failed to follow the opinion of the Court of Appeal, whether because they were persuaded by counsel that it was wrong or through having misunderstood it or because the evidence subsequently adduced made it inapplicable.

It is true that it is stated in paragraph (*i*) that the finding was made "in respect of the provisions of the contract the subject of the said stated case". This refers the reader back to paragraph (*c*), which contains the information that the subject matter of the dispute in respect of which the award was made was the "right of the builder . . . . to be reimbursed for loss or expense incurred by the builder in respect of otherwise unrecovered increased costs of [performance of the contract]"; but this phrase remains cryptic, for the provisions of the contract between the parties under which the Builders' claim was made are not identified, nor is the nature of the increased costs nor the causes of their increase disclosed in this paragraph. Paragraphs (*d*) and (*e*) add to this some slightly more specific information. They disclose that at the time of the case stated some of the increased costs that were the subject matter of the Builders' claim were in respect of increased wages resulting from delay; though no information is vouchsafed as to the cause of the alleged delay. Furthermore there is nothing in those paragraphs or anywhere else in the award which states whether or not the Builders' claim which gave rise to questions of law that were the subject of the stated case extended to increased costs of other items apart from wages, or to increased wages due to causes other than delay.

So all that paragraph (*i*) informs the reader is that in respect of *some* increased costs of performance, the nature of which and the causes of which the award does not disclose, the arbitrators have found the Builders to be entitled to recover from the University under provisions of the contract that are unspecified the sum of $20,562.00. The award does not even say expressly whether any part of that sum, and if so, what part, was awarded in respect of increased wages resulting from delay. It would appear from paragraphs (*f*) and (*g*) of the award that the oral evidence was not heard until after the stated case had been remitted to the arbitrators; for all that appears upon the face of the award, the Builders may have failed to prove their claim under the head of increased wages resulting from delay but succeeded in claims for increases in costs of other items or for increased wages from causes other than delay.

The terms in which the opinion of the Supreme Court is referred to in the narrative paragraphs and the actual finding of the arbitrators is expressed in this award are significantly different from those used in referring to a consultative opinion of the Supreme Court in the *Tuta Products* case. Their Lordships would emphasise that the question is not whether it is a reasonable *inference* from the facts stated in the narrative part of the award that the arbitrators reached their finding as a result of applying the law as stated in the majority judgments of the Court of Appeal on the stated case. Of course it is a reasonable inference, but it is derived from the mere existence of those facts; it does depend for its validity upon the narration of them by the arbitrators in their award.

The preliminary question for their Lordships is one of construction only and construction of that document alone in which the arbitrators purported to set out their award. Did they by the actual words they used in it make manifest their intention to make it challengeable, by incorporating in their award, as a statement of the legal reasoning which they had applied in reaching their decision, those additional documents mentioned in the narrative part of the award from the perusal of which, propositions of law might be

extracted? Reference in the award to the existence of other documents is of itself neutral; it raises no presumption of incorporation as part of the award. Unless the intention to incorporate is clear, the presumption, as their Lordships have already said, should be against incorporation.

In the instant case upon the above analysis of the language of the award, their Lordships have reached the conclusion, contrary to that of Sheppard J., that it does not contain a statement of the legal grounds on which it is based, nor does it incorporate as part of the award any other document which does so. There is nothing that the Supreme Court had jurisdiction to examine in search of legal error.

Upon this preliminary ground, their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

(612029 3) Dd 119991 8/79

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DELIVERED BY LORD DIPLOCK

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