

SCHUTT, J. *In re An Arbitration between the PRESIDENT, ETC., OF THE  
SHIRE OF WODONGA and CARR.*

1923

September 17, 19,

December 3.

*Arbitration—Statement of case by arbitrators—"Question of law arising in the course of the reference"—Arbitrators asked to state case before giving award—Refusal of arbitrators—Jurisdiction of Court to direct arbitrators to state case on question of law—Exercise of Court's discretion—Questions arising incidentally during the reference—Questions in dispute before the reference—Qualification of arbitrators—Form of questions to be asked in special case settled—Arbitration Act 1915 (No. 2614), s. 19.*

The expression, "Any question of law arising in the course of the reference," in sec. 19 of the *Arbitration Act* 1915, is not restricted to questions of law which incidentally arise for the first time in the course of the proceedings before the arbitrators, but includes matters which have arisen before the reference and which have occasioned the reference, being either in the contemplation of the parties at the outset of the dispute or necessarily involved in the dispute, though not actually contemplated, and the Court has jurisdiction to order arbitrators, before award, to state a special case on that basis.

*The Tabernacle Permanent Building Society v. Knight* ([1892] A.C. 298); *Czarnikow v. Roth, Schmidt & Co.* ([1922] 2 K.B. 478); and *Kelantan Government v. Duff Development Co. Ltd.* ([1923] A.C. 395) considered and applied.

In exercising its discretion under sec. 19, the Court will order a special case if satisfied that there is a real point of law, and that the arbitrators are not specially qualified to decide it.

*Re An Arbitration between Nuttall and the Lynton and Barnstaple Railway Co.* ([1899] 82 L.T. 17, at pp. 19 and 20) applied.

Form of questions to be asked in special case settled.

SUMMONS UNDER SEC. 19 OF THE ARBITRATION ACT 1915.

The respondent, Ernest Henry Carr, by contract in writing dated the 21st January 1920, agreed with the applicants, the President, Councillors and Ratepayers of the Shire of Wodonga, to erect a reinforced concrete steel bridge over Wodonga Creek, on the Sydney road, in the Shire of Wodonga.

By clause 26 of the general conditions of contract all such disputes as were therein specifically indicated were to be referred to the determination and award of three indifferent persons—one to be chosen by the council or its engineer, another by the contractor, and the third by two persons so chosen by the parties. Disputes of the nature indicated subsequently arose between the contracting parties, and three arbitrators were appointed as provided by clause 26 of the contract. None of the arbitrators was a lawyer by profession; all were engineers.

The main dispute for the determination of the arbitrators was with respect to a large sum claimed by the contractor as due to him over and above the contract price for what he described as "expenditure due to logs and water and to delay due thereto, and claims in connection therewith." This claim was based upon the assertion that the contractor, in sinking certain reinforced concrete cylinders, as provided for in the plans and specifications, unexpectedly met with much obstruction by reason of the presence of logs and water in the ground where these cylinders were being sunk, and was thereby put to great additional expense, and also greatly hindered and delayed in carrying out the contract.

The claim was opposed on the view that under the contract the contractor had undertaken to sink the cylinders to the depths shown on the plans whatever the nature of the ground might be, and that the council could not be held responsible for any unforeseen difficulties which he might encounter in carrying out the contract.

The arbitrators sat and heard evidence of the respective parties and addresses of counsel in the months of July and August 1923. At the close of the case made by the contractor, counsel for the shire applied to the arbitrators to state a case for the consideration of the Supreme Court on certain matters of law. This application was opposed by counsel for the contractor, and the arbitrators announced that they refused the application. Counsel for the shire then requested the arbitrators to postpone making their award to enable the shire to apply to the Supreme Court for an order directing the arbitrators to state a special case on the questions of law raised. The arbitrators acceded to this request.

On the 27th August 1923 a summons was taken out on behalf of the shire, asking that the arbitrators should be ordered to state, in the form of a special case for the opinion of the Court, certain questions of law arising in the course of the reference.

Substantially, the questions raised were as follows :—Was there a warranty by the council that the ground in which the cylinders were to be sunk did not contain (a) logs, (b) water? Was it competent for the arbitrators to make an award in favour of the contractor upon a claim for breach of warranty that the ground in which the cylinders were to be sunk did not contain (a) logs, (b) water? Must the arbitrators necessarily have found that the labour used and

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materials provided by reason of the presence of logs were not extras, or that such labour and materials were extras? Was the contractor debarred from recovering on the ground that no order in writing was given by the engineer for the shire for such work and materials, or on the ground that the quantities and rates of payment were not ascertained and certified to by the engineer for the shire? Was there any evidence of deceit on the part of the council? Should an award necessarily as a matter of law have been made by the arbitrators in favour of the council or in favour of the contractor? How should the costs of this application be provided for?

*Dixon, K.C., and Martin* for the shire.

*Latham, K.C., and Lewis* for the contractor.

*Cur. adv. vult.*

SCHUTT, J., read the following judgment:—This is an application on behalf of the President, Councillors, and Ratepayers of the Shire of Wodonga for an order under sec. 19 of the *Arbitration Act* 1915, which provides that any arbitrator may, at any stage of the proceedings under a reference, and shall, if so directed by the Supreme Court or a Judge thereof, 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. The arbitration proceedings in connection with which the application is made were the outcome of disputes between the applicant and a contractor named Carr in relation to a contract undertaken by Carr for the erection of a reinforced concrete and steel bridge over Wodonga Creek, on the Sydney road, in the shire of Wodonga. By clause 26 of the general conditions of contract all such disputes as were therein specifically indicated were to be referred to the determination and award of three indifferent persons—one to be chosen by the council or their engineer, another by the contractor, and the third by the two persons so chosen by the parties, and accordingly, when disputes arose of the nature indicated, Messrs. Arthur Cecil Mackenzie, David John McClelland, and James Sutherland Sharland were duly appointed as arbitrators. None of these three gentlemen is a lawyer by profession, but each of them, I understand, occupies a high position in the engineering profession, and is

well qualified to thoroughly appreciate and to decide any questions of fact which might arise in connection with disputes over a contract of this kind, whatever may be said as to their qualifications in relation to questions of law, if the presence or absence of such qualifications be material. The main dispute for the determination of these arbitrators was with respect to a very large sum claimed by the contractor as due to him, over and above the contract price, for what he describes (see item 40 of exhibit F) as "expenditure due to logs and water and to delay due thereto, and claims in connection therewith, as per statement attached." This claim is based upon the assertion that the contractor, in sinking certain reinforced concrete cylinders, as provided for in the plans and specifications, unexpectedly met with much obstruction by reason of the presence of logs and water in the ground where these cylinders were being sunk, and was thereby put to great additional expense and also greatly hindered and delayed in carrying out the contract. The claim was opposed on the ground that under the contract the contractor had undertaken to sink the cylinders to the depths shown on the plans, whatever the nature of the ground might be, and that the council could not be held responsible for any unforeseen difficulties which he might encounter in carrying out the contract. During the proceedings before the arbitrators attempts appear to have been made on behalf of the applicant to force the claimant to specify the precise legal aspect in which he contended that the claim was maintainable, but, so it is said, these efforts met with no success, and the applicant is therefore naturally desirous that the questions of law which are or may be involved should not be left entirely for the decision of the three lay arbitrators, who, it is urged, will experience much difficulty under the circumstances in ascertaining whether there is any legal foundation for the claim.

With a view, therefore, of obtaining the opinion of the Court for the guidance of the arbitrators, an application was made to them to state a Case with reference to certain definite questions of law which were said by the applicant to have arisen in the course of the reference, and which were framed with a view to meeting all possible legal aspects of the claim, and so determining whether in any possible view the claim was legally maintainable. The arbitrators refused the application, and it is now sought to compel them to state a Case with

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reference to the same questions as were then suggested to them, and which are now set out in the summons herein.

To enable me to decide this application it is necessary to consider, firstly, whether I have jurisdiction to make the order asked for, and, secondly, whether this is an appropriate case for its exercise. The jurisdiction depends upon whether these questions now propounded are "questions of law arising in the course of the reference," and, apart from cases which have been decided under the similar English section, I should have thought they are not. Having regard to the history and wording of the section, and to the cases that preceded its original enactment in England in the year 1889—cases in which it was sought by one party to obtain leave to revoke the submission and bring the whole arbitration proceedings to an end because of some comparatively trivial error on the part of the arbitrators—I should have thought that the section was to be understood as restricted to questions of law which incidentally arise for the first time in the course of the proceedings, such as questions relating to the admissibility of evidence or to the conduct of the proceedings in relation to other matters. I should not have thought that it was intended to give the Court the power, by compelling the statement of a Case, to take away from the arbitrator the decision of every question of law involved in any disputed claim referred to him and leave him master of the facts only, notwithstanding the original agreement of the parties that he should try both facts and law. That the Court, in exercising a wider jurisdiction under the section, might effectually deprive the agreement of the parties of its whole force so far as the legal questions involved are concerned is plain, if the arbitrator is bound to follow the opinion of the Court, given though it is in a consultative capacity, and without being subject to appeal; and, apparently, he is so bound: See *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. (a)*. It may be said, of course, and with force, that the jurisdiction, though as wide as suggested, is nevertheless discretionary, and not likely to be exercised except in appropriate cases, however difficult it may be to lay down rules for determining whether the case is an appropriate one or not. Nevertheless it seems strange—at least, to my mind—that an award following upon a decision

(a) [1912] A.C., per Viscount Haldane, L.C., at p. 687.

of an arbitrator, not only on the facts, but on the law, as to which he may have made the most serious mistakes, cannot be interfered with unless an error in law be apparent on the face of the award—an exception which has indeed been deeply deplored by eminent judges—yet that, before award, the whole of the legal questions originally entrusted to the decision of the arbitrator by both parties may be adjudicated upon by a legal tribunal, to his entire exclusion, thus in effect revoking the submission *pro tanto*, and that notwithstanding the fact that there may be no reason to suppose that he may not decide the questions of law aright, for it has been held that an order may be made under sec. 19, even though the arbitrator has expressed no opinion adverse to the applicant: *In re An Arbitration between Spillers & Baker Ltd. and H. Leetham & Sons (b)*, and even though, therefore, an application for leave to revoke the submission would not be entertained. No doubt it has been suggested that the reason why the Court will not set aside the award of an arbitrator for error of law not apparent on its face is that a party should not be allowed to take his chance of obtaining a favourable award, and then raise questions of law if the award prove adverse to him; but this does not seem to me a satisfactory explanation. The wording of the section also must be considered, and, to my mind, the phrase “arising in the course of the reference” does not suggest matters which have arisen before the reference, and which have occasioned the reference, being either in the contemplation of the parties at the very outset of the dispute or necessarily involved in the dispute, though not actually contemplated. They seem to me rather to suggest questions which, if I may use the expression, “crop up” during the reference.

Notwithstanding the difficulty I feel in construing the section in the wider sense, I have, however, come to the conclusion that it is impossible for me, in view of the authorities, to hold that there is no jurisdiction under the section to order the statement of a special case upon such matters of law as are said by the applicant to be involved in the proceedings before these arbitrators. I refer particularly to what was said by Lord Halsbury, L.C., in *The Tabernacle Permanent Building Society v. Knight (c)*, as to the object of sec. 19 of the Act; to the observations of Smith, L.J., and Collins, L.J., in the

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(b) [1897] 1 Q.B. 312.

(c) [1892] A.C., at p. 302.

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case of *Re An Arbitration between Nuttall and the Lynton and Barnstaple Railway Co.* (d); and of Bankes, L.J., and Scrutton, L.J., in *Czarnikow v. Roth, Schmidt and Co.* (e); to the opinions which may be said to appear inferentially from the remarks of Viscount Cave, L.C., and Lord Parmoor in the case of *Kelantan Government v. Duff Development Co.* (f); and to the view expressed by the Full Court of this State in the course of its judgment in *Driver's Case*, which I have seen, but which is not yet reported.

Having arrived, though with reluctance, at this conclusion, I have now to consider whether this is an appropriate case in which to exercise the jurisdiction conferred by the section. It is not, perhaps, easy to discover from the authorities the principles which should guide the Court on this branch of the matter. In *Nuttall's Case* (*supra*), however, Collins, L.J., at pp. 19-20, says:—"It seems to me that the dominant factors are what is the nature of the point of law and what are the qualifications of the arbitrator for deciding the point in question? I think the decisions have gone to this length: that if the Court is satisfied that there is a real point of law, and that the arbitrator is not specially qualified to decide that point, the Court will order the arbitrator to state a Special Case under sec. 19 of the Act." The observations of Bray, J., in *Lobitos Oilfields Ltd. v. Admiralty Commissioners* (g) are much to the same effect, and, adopting the test thus indicated, I think that in the proper exercise of my discretion I should order the arbitrators to state a Special Case as to the matters mentioned in the summons, although I much deplore the attendant delay and expense.

As to the form of the order, however, in so far as it must indicate the questions of law upon which the arbitrators are to state the Case, I have felt great difficulty. As framed by the applicant and set out in the summons, they appear to be based upon questions framed by Cussen, J., when ordering the statement of a Special Case in connection with arbitration proceedings between the Junction North Company and the Broken Hill Proprietary Co. Mr. Justice Cussen gave certain reasons for adopting the forms in which the questions were to be stated in that Case, and referred to certain authorities as

(d) [1899] 82 L.T. 17.

(g) [1917] 86 L.J. (2 K.B.), at p.

(e) [1922] 2 K.B. 478.

1454.

(f) [1923] A.C., at pp. 409 and 418 respectively.

supporting the forms so adopted. No objection was taken to the questions as framed when the matter came before the Full Court (of which I was a member) on appeal from Mr. Justice Cussen, and the propriety of asking them in that way was therefore not the subject of decision by the Full Court. I feel much doubt as to the appropriate form of the questions in this case, as, indeed, I felt also in the case to which I have referred. In particular I feel that in such a case the burden is imposed upon the Court before which the Special Case comes of determining what evidence was admissible—a burden which, as I think, should not be imposed except by means of a special question expressly directed to the question of such admissibility. There seems to be authority, however, for the view that the question of law for the Court may be couched in the form of a question as to whether the evidence before the arbitrators would necessitate or justify a particular conclusion: See *Peter Dixon and Sons Ltd. v. Henderson, Craig and Co. (h)*. Having regard to what was there said, I think the questions which should be asked by the arbitrators in this case are as follows:—

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1. Having regard to the evidence, should it necessarily, as a matter of law, be found by the arbitrators—

(a) That there was a warranty that the ground in which the cylinders were to be sunk did not contain (a) logs and/or (b) water? or

(b) That there was not such a warranty as aforesaid?

2. Having regard to the evidence, is it competent for the arbitrators to make an award in favour of the contractor on the ground of the breach of a warranty that the ground in which the cylinders were to be sunk did not contain (a) logs and/or (b) water?

3. Having regard to the evidence, should it necessarily, as a matter of law, be found by the arbitrators—

(a) That the labour used and materials provided by reason of the presence of (1) logs and/or (2) water in the ground in which cylinders were to be sunk, and which are included in the claim made by item 40 of exhibit F were not extras or additions or enlargements or deviations or alterations

(h) [1919] 2 K.B. 778 (see *per* Swinfen Eady, M.R., and Bankes, L.J., at p. 785).



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to the works which the contractor had by contract (exhibit A) undertaken to perform, or

(b) That the said labour and materials were extras, additions, enlargements, deviations, or alterations to the said works ?

4. Having regard to the evidence, is it competent for the arbitrators to make an award in favour of the contractor on the ground that the labour and materials provided, as set out in the foregoing question, were extras, additions, enlargements, deviations, or alterations to the works which the contractor had by contract (exhibit A) undertaken to perform ?

5. Having regard to the evidence, is it competent for the arbitrators to make an award in favour of the contractor for deceit ?

6. Having regard to the evidence, should an award necessarily as a matter of law be made by the arbitrators—

(a) in favour of the council, or

(b) in favour of the contractor ?

upon all or any and which of the matters referred to in exhibit G ?

With regard to question 5, I think it is not at all clear that any case of deceit has arisen, but as the Case is to be stated on the other points, I think that question may be included.

I order accordingly that the arbitrators state a Special Case for the opinion of this Court upon the questions of law which I have set out above, and I direct that the costs of this application be reserved for the Judge who hears the Special Case, or until further order. Certify for counsel.

*Order for special case.*

Solicitor for the shire : *R. Whitehead.*

Solicitors for the contractor : *Maddock, Jamieson & Lonie.*

H. D. W.