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In my opinion, therefore, the appeal ought to be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *A. Robinson & Co.*

Solicitor for the respondent, *M. F. Bourke.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CARR . . . . . APPELLANT;

AND

THE PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF WODONGA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 7, 8, 29.

KNOX C.J., ISAACS, RICH and STARKE JJ.

Arbitration—Question of law arising in course of reference—Jurisdiction of Supreme Court to direct arbitrators to state special case—Question of law specifically submitted to arbitrators—Discretion—Arbitration Act 1915 (*Vict.*) (*No.* 2614), *sec.* 19.

Section 19 of the *Arbitration Act* 1915 (Vict.) provides that "any referee arbitrator or umpire may at any stage of the proceedings under a reference and shall if so directed by the Court or a Judge 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."

Held, that under the section the Court or a Judge has jurisdiction to direct arbitrators to state in the form of a special case for the opinion of the Court a question of law specifically submitted to them.

Held, also, that, in the circumstances of the particular case, it was a proper exercise of discretion to make such an order.

Decision of the Supreme Court of Victoria (*Schutt* J.): *In re President &c. of the Shire of Wodonga and Carr*, (1924) V.L.R. 56; 45 A.L.T. 89, affirmed with a variation.

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APPEAL from the Supreme Court of Victoria.

A contract was entered into on 21st January 1920 by which Ernest Henry Carr agreed with the President, Councillors and Ratepayers of the Shire of Wodonga to erect a bridge for the price of £20,092 4s. The conditions of the contract provided for the reference to arbitrators of disputes, and for the reference and the award being made rules of the Supreme Court of Victoria pursuant to the *Arbitration Act* 1915 (Vict.)—clauses 26 to 28 of the conditions. Certain disputes which arose between the parties, and in particular a dispute as to a claim by Carr that he was entitled to payment of a sum of £10,415 11s. 4d. for expenditure arising out of the fact that logs and water were found in the ground where certain cylinders were required to be sunk (item 40 of Exhibit F), were referred to arbitrators pursuant to the conditions. After certain evidence was given, counsel for the Shire requested the arbitrator to state in the form of a special case for the opinion of the Supreme Court certain questions pursuant to sec. 19 of the Act. The arbitrators having refused to comply with this request, the Shire applied by summons to *Schutt* J. for an order directing the arbitrators to state in the form of a special case certain specified questions of law which, it was alleged, arose in the course of the reference. *Schutt* J. held that he had jurisdiction to make such an order and that, as there was a real point of law which the arbitrators were not specially qualified to decide, in the proper exercise of his discretion he should make an order. He therefore made an order (*In re President &c. of the Shire of Wodonga and Carr* (1)) that the arbitrators should state in the form of a special case for the opinion of the Supreme Court certain questions, which were substantially as follows :—

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 ?

(1) (1924) V.L.R. 56; 45 A.L.T. 89.

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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 (a) logs and/or (b) 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 to the works which the contractor had by the contract 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 the contract 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 (Exhibit E.H.C. 2A—details of the claim for £10,415 11s. 4d.) ?

From the decision of *Schutt* J., Carr now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Latham K.C. (with him *Hogan*), for the appellant. The questions upon which a case was directed to be stated are not particular points

of law which arose in the course of the arbitration, but are the very questions which were involved in the arbitration, and, if they are answered, there will be nothing left for the arbitrators to decide. There is no jurisdiction to direct such a case to be stated. What is meant by stating a case is stating the facts relevant to the determination of a particular question of law, and the only facts which are relevant are the facts which have been found (see *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1)). The question which is itself referred to arbitration is not a question " arising in the course of the reference " within the meaning of sec. 19 of the *Arbitration Act* 1915 (Vict.). An award will not be set aside for error in law unless the error appears upon the face of the award (*Hodgkinson* v. *Fernie* (2)); but an error in answering the very question of law referred is not such an error in law, because the parties have agreed to abide by the decision of the arbitrators upon it (*In re King and Duveen* (3) ; *Attorney-General for Manitoba* v. *Kelly* (4) ; *Kelantan Government* v. *Duff Development Co.* (5)). A special case will not be directed unless it appears that the arbitrators are about to go wrong (*In re Gray, Laurier & Co. and Boustead & Co.* (6)). [Counsel also referred to *Tabernacle Permanent Building Society* v. *Knight* (7) ; *In re Nuttall and the Lynton & Barnstaple Railway Co.* (8) ; *Czarnikow* v. *Roth, Schmidt & Co.* (9) ; *Lobitos Oilfields Ltd.* v. *Admiralty Commissioners* (10) ; *Peter Dixon & Sons Ltd.* v. *Henderson, Craig & Co.* (11).] No grounds have been shown for the exercise by the Court of its discretion by ordering a case to be stated. There are no grounds for intervening which would not be present in most arbitrations.

Owen Dixon K.C. (with him *Ham* and *Russell Martin*), for the respondent. The appellant's claim was not based on any legal principle, but the arbitrators were asked to pass by all questions of legal liability and make an award against the respondent as a public body. On behalf of the respondent all the legal grounds which

(1) (1913) 16 C.L.R. 591, at pp. 607, 621, 647.
(2) (1857) 3 C.B.(N.S.) 189.
(3) (1913) 2 K.B. 32.
(4) (1922) 1 A.C. 268, at p. 281.
(5) (1923) A.C. 395, at pp. 408, 416.
(6) (1892) 8 T.L.R. 703.
(7) (1892) A.C. 298, at p. 302.
(8) (1899) 82 L.T. 17.
(9) (1922) 2 K.B. 478.
(10) (1917) 86 L.J. K.B. 1444.
(11) (1919) 2 K.B. 778, at p. 784.

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could possibly be set up by the appellant were hypothetically put before the arbitrators, and it was argued that none of them could be sustained. The arbitrators were then asked to state a case on the questions of warranty, extras and deceit, but were deterred from doing so by statements made on behalf of the appellant. To such special circumstances the questions put by *Schutt* J. were considered to be appropriate. The arbitrators, in refusing to state a special case, did not exercise their discretion upon proper principles. Sec. 19 of the *Arbitration Act* 1915 is directed to preventing arbitrators from ignoring legal principles. *In re Gray, Laurier & Co. and Boustead & Co.* (1) is inferentially overruled by *In re Spillers & Baker Ltd. and Leetham & Sons' Arbitration* (2). [Counsel was stopped as to the question of discretion.] The question of law raised is in substance whether there was evidence upon which the arbitrators could decide in the appellant's favour, and that question could not arise until all the evidence was given. The matter was, therefore, within sec. 19. According to the appellant's contention, sec. 19 would be inapplicable to all arbitrations in respect of claims for damages for breach of contract in which the proper interpretation of the contract must be considered. It is to the interest of the public that the law should be administered according to legal principles, and not according to the views of laymen (*Czarnikow* v. *Roth, Schmidt & Co.* (3)).

Hogan, in reply. The statements made by counsel before the arbitrators should not affect the question whether the arbitrator's refusal to state a case was justified. No question can now be framed which would not be hypothetical. The arbitrators should have been asked to find the facts upon which the questions were to be based.

Cur. adv. vult.

May 29. The following written judgments were delivered :—

KNOX C.J. AND STARKE J. An order was made by *Schutt* J. in the Supreme Court of Victoria, directing arbitrators, appointed pursuant to the provisions of a contract between the appellant and the

(1) (1892) 8 T.L.R. 703.
(2) (1897) 1 Q.B. 312.
(3) (1922) 2 K.B., per *Scrutton* L.J., at p. 488.

respondent dated 21st January 1920, to state, in the form of a special case for the opinion of the Supreme Court, certain questions of law. This order was made pursuant to the provisions of the *Arbitration Act* 1915 (Vict.), sec. 19; and by special leave an appeal from it has been brought to this Court (cf. *In re Knight and Tabernacle Permanent Building Society* (1)). It was argued that there was no jurisdiction to make the order, and, even if there were, that the learned Judge had wrongly exercised his discretion in making it.

The former argument was based upon the contention that sec. 19 only concerned questions of law arising in the course of the reference, and did not extend to questions of law specifically submitted to the arbitrators (*Kelantan Government* v. *Duff Development Co.* (2)). But it must be remembered that the jurisdiction given by sec. 19 is "consultative only" (*In re Knight and Tabernacle Permanent Building Society* (3)) and that the words of the section are extremely wide. Any question of law arising in the course of the reference may at any stage of the proceedings be voluntarily stated by the arbitrators. If the arbitrators voluntarily require the assistance of the Court upon a question of law specifically submitted to them, why should they not have that assistance? The question of law does in that case arise in the course of the reference. And if the arbitrators could voluntarily state the question submitted to them, then there is no reason, except as a matter of discretion, why the Court may not require them to do so. Further, the questions which *Schutt* J. required to be stated in the form of a special case were not, as a matter of fact, specifically submitted to the arbitrators, but arose incidentally during the proceedings before them. We feel no doubt, then, that the learned Judge had jurisdiction in the present case to require the arbitrators to state questions of law in the form of a special case for the opinion of the Supreme Court. And we think that, as a matter of discretion, some order was expedient and even necessary.

The conduct of the case before the arbitrators by the learned counsel who then appeared for the appellant was, we regret to say,

(1) (1891) 2 Q.B. 63; (1892) A.C. 298.
(2) (1923) A.C. 395.
(3) (1892) 2 Q.B. 613 (C.A.).

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Knox C.J. Starke J.

most unfortunate. He would never define the basis of the appellant's claim, and, in our opinion, inaccurately stated the law in relation to the powers and duties of arbitrators, and the effect of an award. In consequence the arbitrators might have been, and probably were, misled in the proper performance of their duties, and we therefore think *Schutt* J. exercised his discretion wisely in ordering a case to be stated.

We cannot, however, agree to the precise questions formulated by him, because they usurp, in many respects, the functions of the arbitrators, both as to fact and law. Thus, to take question 6, by way of example, the Court cannot decide what award should be made, but can simply advise the arbitrators on questions of law. And, with the assistance of the parties, this Court has framed two questions which will cover the whole ground and in nowise usurp the function of the arbitrators. Consequently the questions directed by the order of *Schutt* J. must be set aside, and the following substituted:—"(1) Are any and which of the items set forth in Exhibit G (Exhibit E.H.C. 2A) referable to arbitration under the contract between the parties dated the 21st day of January 1920? (2) Is there any evidence proper, on recognized legal principles, to go to the arbitrators upon the claim of the contractor in respect of any and which of the items set forth in Exhibit G (Exhibit E.H.C. 2A) which are referable to arbitration under the said contract?" Otherwise the order is affirmed. The parties will abide their own costs of this appeal.

ISAACS AND RICH JJ. We are of opinion that the order of *Schutt* J. was correct, and should be affirmed, with an alteration in the form of the questions to which the statement of the case is to be directed. That alteration does not in any way affect the real meaning and intent of the learned primary Judge in making the order appealed from. It is simply the result of the discussion before us in condensing the points he aimed at.

The appellant contended that in the circumstances the Court had no jurisdiction to order a case to be stated because the points to be considered were the very ones submitted to the arbitrators, and, if it had jurisdiction, it ought not in the proper exercise of judicial

discretion to have made the order. The power is clear. The nature of the *Arbitration Act* 1915, under sec. 19 of which the present questions arise, may be shortly described as a legislative provision for giving greater binding effect to agreements for arbitration, and incidentally to determinations of arbitrators, special referees and umpires, than they had before. But, while making the determinations of these non-judicial tribunals more effective legally, the Legislature took care also to provide some special means of guarding against plain or possible departure from the law of the land, and other injustice. Two principles relevant to this case are discernible, and they have to be adjusted : the first is that, where parties have agreed to refer a question to arbitration, the arbitral decision is to bind them unless they agree to the contrary (sec. 4 (2) and Second Schedule) ; the other is that, if on the way it appears to the arbitrators or to the Court a proper case for curial assistance, means are provided (sec. 19). Other legislative safeguards exist, but are irrelevant.

The words of sec. 19 are so broad and general, and in relation to a matter so clearly calling for an interpretation based on the full natural meaning of the words, that it is impossible to doubt the jurisdiction in all cases during the progress of the reference, that is, before award (*Tabernacle Permanent Building Society* v. *Knight* (1)). Lord *Halsbury* L.C. in that case said (2), as to sec. 19, that its object was " to hold a control over the arbitration while it was proceeding by the Courts, and not to allow the parties to be concluded by the award, when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made." Lord *Field* said (3) : " Upon the party going before a Judge and showing that the case is one involving some question of law (upon which two opinions may possibly exist) the Judge has power to compel the arbitrators to state a case."

One special circumstance in relation to sec. 19 should be mentioned. It includes a reference under order of the Court, and in such a case it would be absurd to argue any want of power in the Court to act under sec. 19 at its discretion. But as the section must have

(1) (1892) A.C. 298.
(2) (1892) A.C., at p. 302.
(3) (1892) A.C., at p. 308.

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Isaacs J. Rich J.

the same jurisdictional content to whatever kind of reference it is applied, the objection as to power cannot be maintained.

But though the power of the Court to intervene under sec. 19 is undoubted, it is not intended thereby to supersede the authority of the arbitrator. The Court's opinion is not a decision; it is not a judgment or order. It is not appealable, and it is and remains an opinion only, to guide the arbitrator. The arbitrator still remains the final judge of law and fact, as to the matters submitted (*Tabernacle Society's Case* (1)). This, however, must not be misunderstood. It is because the Legislature has not made the opinion a judgment or order. But, on the other hand, let it be clearly understood, the Legislature has not made that opinion finally binding as the law of the case; and therefore there comes into play a very deeply rooted principle of the common law, not displaced by the legislation. If it appears on the face of the award that the law embodied in the opinion has been acted on, it may be challenged, and if necessary corrected (*British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (2), *Attorney-General for Manitoba* v. *Kelly* (3) and the *Kelantan Case* (4)).

As to discretion, we think that the order was well made on the ground and the principle stated by *Schutt* J. There were two reasons advanced before us for the exercise of discretion. Both relate to the conduct of the case. The first was that referred to by *Schutt* J., namely, that no distinct legal grounds or principles were stated to the arbitrators for their assistance, so as to enable them, as far as the selected tribunal could, with all the light reasonably available, to arrive at a just conclusion in accordance with law. The magnitude and intricacy of the claims and the sum involved made such assistance particularly desirable. Arbitrators are not selected to act despotically or illegally if that can be reasonably prevented. The case was therefore obviously one for the exercise of the discretion of the Court in the manner and for the reason stated by the learned primary Judge.

The other reason had reference to the conduct of the case by counsel for the contractor at the time when the arbitrators were

(1) (1892) 2 Q.B. 613.
(2) (1912) A.C. 673.
(3) (1922) 1 A.C., particularly at p. 281.
(4) (1923) A.C., particularly at p. 411.

requested to state a special case. As to this, it is unnecessary, in the view we take of the first point, to say anything, and, having regard to the absence in this appeal of that learned counsel, we say nothing about it.

We agree to the order suggested.

Order appealed from varied by striking out the questions directed to be stated and substituting those set out in the judgment of Knox C.J. and Starke J. Otherwise order affirmed. Parties to abide their own costs of the appeal.

Solicitors for the appellant, *Maddock, Jamieson & Lonie.*

Solicitor for the respondent, *V. J. Whitehead.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BANNISTER . . . . . APPELLANT;
DEFENDANT,

AND

HEYMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Feb.* 20-22; *June* 10.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Contract—Construction—Performance—Agreement to purchase at future time goods to be then ascertained—Readiness and willingness—Appropriation of goods—Agreement to grant sub-lease—Consent of lessor not obtained—Repudiation.

The plaintiff, who was carrying on the business of a ship-chandler and desired to sell and dispose of all his stocks of chandlery, entered into an agreement with the defendant whereby it was agreed (*inter alia*) that, from and after the date of the agreement and for a period ending on a specified date, the