[1988–90 Gib LR 201]

SOUTHPORT PROPERTIES LIMITED v. FABRI CONSTRUCTION LIMITED

SUPREME COURT (Kneller, C.J.): November 21st, 1989

Arbitration—award—setting aside award—award final unless misconduct by arbitrator, or error on face of record—error of fact not misconduct—appeal by way of special case stated on question of law also possible—court to assess arbitrator's award on most favourable construction—questions of fact for determination by arbitrator, not court—uncertain award may be set aside or remitted to arbitrator for determination

Arbitration—award—setting aside award—procedure—error on face of record entitles court to set award aside—appeal may lie by way of special case stated on question of law—court to assess arbitrator's award on most favourable construction—arbitrators to set out evidence supporting conclusions—appeal on basis of lack of evidence supporting conclusions to be set out as question of law in special case

The plaintiff moved the court to set aside an arbitration award.

The plaintiff had engaged the defendant to carry out building work on its premises, retaining it on a fixed-price contract to add extra floors to the building, and to carry out additional work on the foundations, in addition to performing other minor works. The contract set a date for completion, and provided for both a performance bond for early completion of the works and a penalty of £1,000 for every week's delay. The parties fell out over the performance of the agreement before the additional works were finished, and appointed an arbitrator to determine, *inter alia*, the value of the additional works, whether preliminaries were payable for them, the completion date for the contract and additional works, and the amount of the penalty payable by Fabri to Southport for late completion. The arbitrator ordered that Southport pay Fabri £75,065.21, an amount that was "to be reduced subject to any additional works that [had] not been carried out"; he also ruled that the penalty clause for late completion was inapplicable to the contract, that Fabri was entitled to be paid preliminaries on the additional works and that interest was to be payable on late payments.

The plaintiff submitted that the arbitrator's award should be set aside, as it (a) was uncertain, in that it did not conclusively determine the final amount due and the interest on it; (b) was the result of an erroneous application of the law, in that it held that the penalty clause in the letter of

appointment was void on the ground that it did not provide for the extension of the completion date; (c) was inconsistent, in that the arbitrator was prepared to imply normal contractual terms to give business efficiency to the period for honouring payment certificates (by applying the standard period of 14 days), but not to the penalty clause; (d) included matters outside the arbitrator's terms of reference by dint of ordering that interest was payable on late payments; and (e) entitled the defendant to be paid preliminary expenses (which had not been referred to or apportioned in the original tender or the contract, or at any subsequent point) for the additional work without any justification.

The defendant submitted in reply that (a) the award was not wrongly made in respect of the penalty clause, as Fabri had not agreed to complete the additional works within the original time-limit; (b) there was no inconsistency in the award, as (in contrast to the penalty clause, which could not apply to the amended dates) no stipulation had been made concerning the period for honouring payment certificates and so the standard period was applied by the arbitrator; (c) the arbitrator had the specific power to decide other related issues between the parties, and so had not exceeded his terms of reference in doing so; and (d) in all building works there was some element of preliminary cost, and, given that the contract was silent on the variation of the contract, the valuation should be carried out on a fair and reasonable basis, which included the apportionment of costs as preliminaries.

Held, setting the award aside,

(1) The award was uncertain. Although an arbitration award was in general final and binding on the parties, the Supreme Court had the power to set aside an award made by an arbitrator who had misconducted himself or the proceedings. An error of fact did not constitute misconduct of the proceedings; an error on the face of the record, however, did entitle the court to set an award aside, and an appeal could also be taken by way of special case stated on a question of law. The court, in assessing an arbitrator's award, was to look at it in the most favourable way possible. Questions of fact were for the arbitrator, and not the court, to determine; arbitrators should, however, set out the evidence supporting their conclusions, and an appeal on the basis that there was no evidence supporting an arbitrator's conclusions should be set out as a question of law in a special case. An award that did not constitute a final decision on all matters requiring determination could also be set aside or remitted to the arbitrator for decision; the award in the present case was made on the basis that it was to be reduced by the undetermined cost of the additional works not carried out, and was therefore too uncertain to be applied. Including in the award a rule of simple arithmetic for calculating the reduction in the award would have remedied this (para. 19; paras. 21–25; para. 27).

(2) The arbitrator had erred in law in ordering that Southport was to pay Fabri for preliminaries on the additional works; this was an error on the face of the record, entitling the court to set the award aside. Neither the

letter of tender nor the contract provided for the payment of preliminaries, and they were not agreed at any later date. There was no evidence to suggest that the employer should pay preliminaries for all building works, and no support for the arbitrator's decision to add them on a fair and reasonable—or indeed any—basis in the absence of an agreement to this effect between the parties (para. 31).

(3) The arbitrator was right to rule that the penalty clause was no longer applicable, although his reasons for doing so were incorrect. The fact that the letter of tender did not explicitly allow for the contract period to be extended was irrelevant; the penalty clause was inapplicable because Fabri had not agreed to complete the extra works within the original time-limit. A builder who agreed to complete extra works within the original time-limit would be bound by his agreement; but as here there had been no agreement, Southport was not entitled to claim the penalties for delay (para. 26; para. 28).

(4) The award was not inconsistent; the arbitrator was free to apply the usual practice for honouring the payment of certificates, but was bound by authority in determining that the penalty clause was inapplicable (para. 29).

(5) The arbitrator's decision to award interest on late payments was covered by the reference in the arbitration agreement to "other matters in issue" between the parties, and so he had not exceeded his powers (para. 30).

Cases cited:

(1) *Adams* v. *Great N. of Scotland Ry. Co.*, [1891] A.C. 31, applied.
(2) *Associated Props. Ltd.* v. *Cecil Co. Ltd.*, Supreme Ct., Case No. 1988 A. 153, unreported, applied.
(3) *British Westinghouse Elec. & Mfg. Co. Ltd.* v. *Underground Elec. Rys. Co. Ltd.*, [1912] A.C. 673; [1911–13] All E.R. Rep. 63; (1912), 81 L.J.K.B. 1132; 56 Sol. Jo. 734; 107 L.T. 325, applied.
(4) *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, [1923] A.C. 480; [1923] All E.R. Rep 235; (1923), 92 L.J.P.C. 163; 129 L.T. 166; 39 T.L.R. 253, applied.
(5) *Clark (James) (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.*, [1944] K.B. 566; (1944), 113 L.J.K.B. 567; 170 L.T. 417; 60 T.L.R. 476, observations of Tucker, L.J. applied.
(6) *Dodd* v. *Churton*, [1897] 1 Q.B. 562; (1897), 66 L.J.Q.B. 477; 45 W.R. 490; 41 Sol. Jo. 383; 76 L.T. 438; 13 T.L.R. 305, applied.
(7) *Ellison* v. *Bray* (1864), 9 L.T. 730, applied.
(8) *GKN Centrax Gears Ltd.* v. *Matbro Ltd.*, [1976] 2 Lloyd's Rep. 555; (1976), 120 Sol. Jo. 401, applied.
(9) *Goddard, In re* (1850), 19 L.J.Q.B. 305; 1 L.M. & P. 25, applied.
(10) *Hartley (R.S.) Ltd.* v. *Provincial Ins. Co. Ltd.*, [1957] 1 Lloyd's Rep. 121, applied.

(11) *Johnson* v. *Latham* (1850), 19 L.J.Q.B. 329; 1 L.M. & P. 348; 15 L.T.O.S. 211, applied.
(12) *Jones* v. *St. John's College, Oxford* (1870), L.R. 6 Q.B. 115; 40 L.J.Q.B. 80; 19 W.R. 276; 23 L.T. 803, applied.
(13) *Margulies Bros. Ltd.* v. *Dafnis Thomaides & Co. (U.K.) Ltd.*, [1958] 1 W.L.R. 398; [1958] 1 All E.R. 777; [1958] 1 Lloyd's Rep. 250; (1958), 56 L.G.R. 398; 102 Sol. Jo. 271, applied.
(14) *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, [1898] 1 Q.B. 487; (1898), 67 L.J.Q.B. 313; 46 W.R. 292; 78 L.T. 211; 42 Sol. Jo. 232; 14 T.L.R. 201, applied.
(15) *Montrose Canned Foods Ltd.* v. *Eric Wells (Merchants) Ltd.*, [1965] 1 Lloyd's Rep. 597, applied.
(16) *Oleficio Zucchi SpA* v. *Northern Sales Ltd.*, [1965] 2 Lloyd's Rep. 496, observations of McNair, J. applied.
(17) *Peak Constr. (Liverpool) Ltd.* v. *McKinney Foundations Ltd.* (1970), 69 L.G.R. 1; 1 B.L.R. 114, applied.
(18) *Ransom (Insp. of Taxes)* v. *Higgs*, [1973] 1 W.L.R. 1180; [1973] 2 All E.R. 657; [1973] S.T.C. 330; (1973), 52 A.T.C. 154; [1973] T.R. 109, applied.
(19) *Tersons Ltd.* v. *Stevenage Dev. Corp.*, [1965] 1 Q.B. 37; [1964] 2 W.L.R. 225; [1963] 3 All E.R. 863; [1963] 2 Lloyd's Rep. 333; [1963] R.A. 393, applied.
(20) *Tomlin* v. *Fordwich Corp.* (1836), 5 L.J.K.B. 209; 5 Ad. & El. 147; 111 E.R. 1121, applied.
(21) *Williams* v. *Wallis & Cox*, [1914] 2 K.B. 478; [1914–15] All E.R. Rep. Ext. 1531; (1914), 12 L.G.R. 726; 78 J.P. 337; 83 L.J.K.B. 1296; 110 L.T. 999, observations of Atkin, J. applied.

Legislation construed:

Arbitration Ordinance (1984 Edition), s.6: "An arbitration agreement, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in Schedule 1, so far as they are applicable to the reference under the arbitration agreement."
s.19(1): "In all cases of reference to arbitration the court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."
s.20(2): "Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration award has been improperly procured, the court may set the award aside."
s.21: "An award on an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect and in such case judgment may be entered in terms of the award."
s.22: "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."
Schedule 1, para. 6: "The award to be made by the arbitrators or umpire

shall be final and binding on the parties and the persons claiming under them respectively."

D.J.V. Dumas for the applicant;
A.V. Stagnetto, *Q.C.* for the respondent.

1 **KNELLER, C.J.:** The employer, Southport Properties Ltd. ("Southport"), moved the court to set aside with costs an award made between it and the contractor, Fabri Construction Ltd. ("Fabri"), by Mr. Christopher Malcolm Eggleton, their arbitrator, on June 7th, 1988, on the grounds that (a) it is uncertain; (b) the law applied is erroneously stated; (c) it is inconsistent; (d) it includes matters beyond his terms of reference; and (e) it entitled Fabri to be paid for preliminaries for the additional works for which there was no evidence. Fabri is content with the award and supports it.

2 The resort to arbitration came about in this way. On August 11th, 1986, Southport entered into a written agreement that Fabri would undertake certain building works for Southport at the latter's premises at 305/309 Main Street, Gibraltar. Southport wanted some floors added to its premises; it accepted Fabri's tender for the project and awarded the contract to it. No one else was invited to tender. In the letter of appointment of August 11th, 1986, the agreement was, in brief:

		£
"1. Cost of:	(a) the tender sum and the sum for the additional work on the foundations:	155,000
	(b) three additional items:	1,500
	(c) extra work on the cistern:	250
Total price:		156,750
2. Insurance arising out of old standard clause 192A to be paid by Southport. All other insurance to be paid by Fabri.		
3. Fabri to take a performance bond amounting to 10% of the contract price.		15,675
4. Fabri to produce monthly claims for work done. Architect to produce monthly certificates based on these claims.		
5. Retention to be 5% of each certificate payment.		
6. Retention fund. 2.5% to be paid to Fabri when the practical completion certificate is paid. 2.5% to be paid at the end of the one year maintenance period if all defects have been put right satisfactorily.		
7. Date of possession:	August 11th, 1986	

Date of completion: May 25th, 1987

8. Bonus of £1,000 per week for every week completion date advanced (limited to four weeks).

9. Penalty of £1,000 per week for every week beyond completion date, with no limit."

This was a fixed-price contract for a fixed amount of work without the preliminary element being specified. The contract was set out in another document dated July 22nd, 1987, which was never signed.

3 Southport and Fabri had fallen out over the performance of the agreement by March 15th, 1988, before the additional works were finished, so through their solicitors they agreed to ask Mr. Eggleton to be their arbitrator.

4 His written terms of reference required him to decide—

(a) the value of the additional works done by Fabri;

(b) whether preliminaries were payable for them;

(c) the completion date for the contract and additional works;

(d) the amount, if any, that Fabri should pay Southport for late completion;

(e) whether Southport was entitled to retain moneys due to Fabri, and if so, what percentage of the total price and for what period;

(f) the parties' dispute about a performance bond;

(g) the amount and apportionment of the costs of the arbitration and valuation, and make them part of the award; and

(h) other related matters in issue between them.

5 The arbitrator's decision was that—

(a) the cost of the additional building work was £94,279.18 and the cost of the additional labour was £5,460.00;

(b) the value of the additional work—but not the increased labour cost—should attract a 19.01% preliminaries element because this element was part of the original tender. Had it been set out separately in the tender, Fabri could have charged for it on a time-related basis;

(c) the completion date was March 31st, 1988. The letter of appointment did not allow for any extension but the parties' terms of reference did;

(d) the penalty clause for late completion was void because the letter did not allow for the contract period to be extended;

(e) Southport could release half the retention fund to Fabri on March 31st, 1988 and keep the rest until March 30th, 1989, provided that the defects arising during that period had been put right satisfactorily;

(f) the performance bond was unnecessary because the date for practical completion had passed; and

(g) the interest payments began 14 days after Southport was given the architect's payment certificate.

6 The arbitrator concluded in this way:

"AND ACCORDINGLY I HEREBY AWARD AND DIRECT THAT:

> 1. Southport Properties shall within 28 days of the date on which this award is taken up by either party pay to Fabri Construction Ltd. the sum of £75,065.21 in full and final settlement of all claims referred to me herein . . .

This amount will be reduced subject to any additional works that have not been carried out.

The costs of this my award shall be apportioned as follows:

Fabri Constructions Ltd.:	£900.00
Southport Properties Ltd.:	£2,100.00"

7 Southport submits that the arbitrator's statement that "this amount will be reduced subject to any additional works that have not been carried out" means that the parties do not know what Southport must pay Fabri. It is uncertain as to the amount due, and as to the interest payable on it. Thus, it is impossible to enforce the award as a judgment. It is bad on the face of the award.

8 Fabri's reply is that the arbitrator was asked to value the additional works, and not to decide whether they had been completed. When he made his award, some of the additional works had been valued separately in the award, and the amount for any not completed would be deducted. The award could be sent back to him to delete the items not completed.

9 Southport's next attack is on the arbitrator's stated principle of law for his approach to the penalty for late completion, or on his application of it. The arbitrator held that the penalty clause in the letter was void because although it provided that a penalty would be payable for late completion, it did not provide for the completion date to be extended. The penalty clause provides that Fabri will pay Southport £1,000 per week for every week in excess of the completion date, and that there will be no limit to the possible maximum penalty. The parties' contractual obligations are in force until the works are completed. This is normal practice, according to Southport. The arbitrator's principle of law was wrong or wrongly applied.

10 Fabri supported the arbitrator's approach. The contract set out the works that had to be done, fixed a date for their completion and imposed a weekly penalty without limit for not completing them on time. Then Southport asked Fabri to do additional works and Fabri agreed. A new completion date was set by the arbitrator. This varied the contract. There was no mention of a penalty clause, and the one for the original contract work no longer applied.

11 The inconsistency in the award, according to Southport, is that the arbitrator was not prepared to imply normal contractual terms to the penalty clause so as to give business efficiency to that term in the parties' agreement, but he was when it came to the period for honouring the payment certificates by stipulating that the normal period of 14 days should apply, and he went on to award interest on late payments.

12 Fabri denies that there is any inconsistency. There was an express provision for Fabri to pay a weekly penalty without limit for the contract work if it were not completed by an agreed date. It was agreed that additional work should be done and the arbitrator extended the date for the completion of the contract and additional work together. The penalty clause applied to the completion of the contract work. It could not and did not apply to the completion of the contract and additional work, because the penalty clause did not apply to the later completion date. The contract was silent on the period for honouring certificates, so the arbitrator applied the normal 14-day period.

13 As for including matters in the award which were not within his terms of reference, the arbitrator did this when he awarded interest on late payments, thereby exceeding his authority—or so Southport claimed. This, according to Fabri, was covered by the reference to the arbitrator's power to decide or value any other matters arising in relation to the contract and the building works thereunder.

14 And, finally, in its amended motion of July 4th, 1988, Southport impugned the arbitrator's findings that Fabri was entitled to be paid for preliminaries on additional works because these formed part of the original tender and that the additional work should attract the same element at a cost of 19.01% of the overall price. Fabri's tender was in its letter of February 12th, 1986, and it did not refer to any costs to be apportioned as preliminaries. There was no evidence for the arbitrator's finding. In short, he erred in law when he made it.

15 Fabri's stand on this is twofold. First, its director swears that in all building works there is an element of preliminary costs. Here, they were duly included in the cost of the contract work, and so they should be included in the cost of the additional work. Secondly, the arbitrator has merely applied the principle that if a contract is silent on how a variation is to be valued, the valuation should be done on a fair and reasonable basis.

16 Such being the facts, the motion on notice and a summary of counsel's submissions, I turn to the law. First, the statute law. An award made by an arbitrator is final and binding unless a contrary intention is expressed in the agreement, according to s.6 and Schedule 1 of the Ordinance. The Supreme Court may set aside the award of an arbitrator, however, if (among other things) he has misconducted himself or the proceedings: see ss. 2(1) and 20(2). Or it can remit a matter for his reconsideration: s.19(1). These are, as the wording indicates, matters of discretion. An award may by leave of the court be enforced in the same manner as a judgment or order to the same effect: s.21. If the award directs the payment of any sum it will, unless the award otherwise directs, carry interest from its date and at the same rate as a judgment debt: s.22.

17 Secondly, the case law. No decision of a Gibraltar court was cited. Some English authorities were laid before the court, and the others I take from the recent judgment in *Associated Props. Ltd.* v. *Cecil Co. Ltd.* (2), all of which seem, with respect, good law and apt for arbitrations in Gibraltar, since the sources for the ordinance include three English Arbitration Acts. They yield, in my view, these guidelines.

18 "Misconduct" means personal turpitude on the part of the arbitrator or a mishandling of the proceedings which amounts to some substantial miscarriage of justice, *e.g.* he refuses to hear evidence on a material issue: *Williams* v. *Wallis & Cox* (21), *per* Atkin, J. It does not cover either his failure to understand the parties' contentions or any contradictions and inconsistencies in his award: *Oleficio Zucchi SpA* v. *Northern Sales Ltd*. (16), *per* McNair, J.

19 Statute apart, the arbitrator's decision is final because the parties chose him: they usually select someone with special knowledge and experience in the relevant class of business; they voluntarily submit their differences to him, agree to accept his decision, and expect a quick, cheap solution to their dispute. The finality of his decision is subject to three exceptions, namely, where (a) there is an error on the face of the award; (b) the arbitrator has been guilty of misconduct; or (c) a special case is stated on a question of law: *Tersons Ltd.* v. *Stevenage Dev. Corp.* (19).

20 An error on the face of the record includes one upon some piece of paper accompanying and forming part of it: *British Westinghouse Elec. & Mfg. Co. Ltd.* v. *Underground Elec. Rys. Co. Ltd.* (3); *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.* (4).

21 All questions of fact are within the sole domain of the arbitrator. He should set out accurately the relevant evidence supporting his conclusions so that a reasonable man can accept them as true. An incomplete summary of the facts is not a question of law, and a mistake of fact does not amount to misconduct. If the facts set out in the record reveal that there is no evidence to support the award, the aggrieved party should ask the

arbitrator to pose it as a question of law in a special case: *Hartley (R.S.) Ltd.* v. *Provincial Ins. Co. Ltd.* (10); *GKN Centrax Gears Ltd.* v. *Matbro Ltd*. (8); *Ransom (Insp. of Taxes)* v. *Higgs* (18).

22 The sanctity of arbitrators' awards is such that it is the duty of the court to look at them in the way most favourable to their presentation: see Tucker, L.J. in *Clark (James) (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.* (5) ([1944] K.B. at 568). So much is this so that the general rule is that the parties cannot object to an award if it includes an error of law or fact: *Adams* v. *Great N. of Scotland Ry. Co.* (1).

23 Focusing narrowly now on the issues in this motion, the starting point is that it is an implied term of the agreement for arbitration that the award should be in such a form that it would be capable of being enforced under the Ordinance as a judgment, which means that it must be a final and certain decision on all matters requiring the arbitrator's determination at the time it is made. The arbitrator should not, according to the oldest authorities, reserve a future power, authority or examination. The award may be bad even if he determines all matters save one, for, depending on the circumstances, it can be set aside or remitted to the arbitrator. *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (14); *Montrose Canned Foods Ltd.* v. *Eric Wells (Merchants) Ltd.* (15).

24 He should not, according to venerable authorities, refer any difference between the parties to a third person, for that would be a substituted judgment and bad. See, *e.g.*, *Tomlin* v. *Fordwich Corp*. (20); *Johnson* v. *Latham* (11); *In re Goddard* (9); *Ellison* v. *Bray* (7).

25 There must be no reasonable doubt on the face of the award as to the arbitrator's meaning, or as to the nature and extent of the duties imposed op the parties by it: *Margulies Bros. Ltd.* v. *Dafnis Thomaides & Co. (U.K.) Ltd.* (13). But the award can still be certain and enforceable even if it does not set out the result, provided that the arbitrator gives the rule for calculating it if that would be a matter of "mere arithmetic": *Russell on Arbitration*, 20th ed., at 316 (1982).

26 Clauses about penalties for delay in a building contract will still bite if the employer orders extra works and the builder agrees to complete the extra works within the time stipulated for the original contract's work. This is so even though it is impossible for him to complete them all within time, because he must take the consequences of his foolish agreement: *Jones* v. *St. John's College, Oxford* (12). If there is no such agreement then, by ordering extra works, the employer deprives himself of claiming the penalties for delay: *Dodd* v. *Churton* (6); *Peak Constr. (Liverpool) Ltd.* v. *McKinney Foundations Ltd*. (17).

27 Returning now to Southport's grounds of appeal, I find that the award is uncertain because it is to be reduced by the cost of the additional works

that were not carried out. This is reserving to someone else a future power, authority or examination which makes it a substituted judgment and therefore bad. And there is no rule of simple arithmetic in it for calculating the result since it is the actual cost of the works which were not completed—and not the agreed cost of those works—that is to be deducted. Southport succeeds on that ground.

28 If I am wrong on that, I hold that the arbitrator was right to rule that the penalty clause no longer applied. Fabri did not agree to complete the original and extra work within the time stipulated for the original work. Southport deprived itself of claiming the penalties for delay when it ordered extra works, insisting on their being done within the same time as the original work. The reasons given by the arbitrator for declaring the penalty clause void were, however, wrong.

29 There was no inconsistency in the award because the arbitrator applied the usual practice when it came to honouring the payment of certificates and did not do so when it came to the penalty clause for failure to complete by the extended date. The former was open for him to decide and the latter the subject of authority which in the circumstances prohibited such an award.

30 He did not include matters that were not in his terms of reference when he awarded interest on late payments, for this was covered by the parties' agreement that he should decide "other matters in issue between them" so far as the contract and the building works were concerned.

31 Finally, the arbitrator erred in law when he determined that Fabri was entitled to be paid for preliminaries on the additional works ordered. They were not mentioned in the original tender for the original works. They were not agreed later. There is no evidence or authority for maintaining that for all building works the employer must pay the cost of the preliminaries. I do not accept that the arbitrator should add them on a fair and reasonable basis or on any basis if the agreement for the original or additional works do not do so and it is not agreed by the parties later.

32 The result is that the award must be and is set aside with costs.

Award set aside.