"True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures – unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes, we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state."

He was writing of lawyers in general. What he wrote applies to advocates to fulfil the role which the law gives them.

THE STATED (OR SPECIAL) CASE

John A. Morrisey, F.I.Arb.A.

A stated case is a statement of facts found by the arbitrator (or agreed to on behalf of the parties) and submitted for the opinion/decision of the court as to the law bearing upon the facts so stated.

In a recent case before the Privy Council, Lord Diplock had this to say:

"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 complel 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 (N.S.W.)." (University of N.S.W. v. Max Cooper & Sons Pty. Ltd. *(1979).*

In all Australian States and in New Zealand an arbitrator or umpire may *at any stage of the proceedings* under a reference and shall, if so directed by the court state in the form of a special case for the opinion/decision of the court any question of law arising in the course of the reference – N.S.W. s.19; QLD. s.29(1); VIC. s.19; S.A. s. 20; W.A. s.21; TAS. s.20; N.Z. (1938) s.11(1).

In Queensland and New Zealand an arbitrator or umpire also may, and shall if so directed by the court, state any award or any part of an award or any interim award in the form of a special case – QLD. s.29(1); N.Z. (1938) s.11(1), and a special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated or may be directed by the court to be stated notwithstanding that proceedings under the reference are still pending – QLD. s.29(2); N.Z. (1938) s.11(2).

In the other Australian States, an arbitrator or umpire, unless the submission expresses a contrary intention, has power to state an award as to the whole or part thereof in the form of a case stated for the opinion of the court – N.S.W. 2.9; VIC. s.8; S.A. 6.6; W.A. s.9; TAS. s.9. However, under these Acts he cannot be directed to state such an award and it is not misconduct to refuse any such application by a party.

The power to state a case cannot be restricted by the terms of the arbitration agreement. The jurisdiction of the court cannot be ousted and any such agreement is contrary to public policy. *Henry v. Uralla Municipal Council (1934).*

If the disputed matters are questions of fact a stated case is wholly inappropriate, but it is a question of law whether there is any evidence on which an arbitrator could come to a particular finding of fact.

If in the course of an arbitration a request is made in a proper case for the stating of a case for the opinion/decision of the court it should be either acceded to or an opportunity given to the applicant to apply to the court for an order directing the arbitrator or umpire to state a case and if the arbitrator or umpire refuses to adopt either course and proceeds to make an award he is guilty of misconduct.

An arbitrator during his proceedings may state a case of his own volition although in practice this is unlikely to arise. However it should be noted that it is the arbitrator's case, not that of the party requesting it. Unless directed by the court, the arbitrator has complete discretion as to whether or not he states a case. An arbitrator should only agree to state a case where the point of law is:

a) real and substantial and not a mere pretext for delay;
b) clear-cut and capable of being accurately stated;
c) of such importance that resolution of it is necessary for the proper determination of the matters in issue.

In order to apply this test, the party requesting a stated case should be required by the arbitrator to formulate the exact question in writing. If in the opinion of the arbitrator it fails the test, he should refuse. If a party insists, the arbitrator should adjourn for a definite reasonable time to allow that party to make an application to the court.

If the arbitrator states a case, it should contain:

i) his findings of the facts which are relevant to the issue of law (and not a statement of the evidence);
ii) the precise question of law that the court has to determine.

He should be careful how he phrases his question otherwise the time of the court and of others may be wasted.

In practice the party requiring a stated case usually drafts it and then seeks the other party's agreement. Even when the parties agree on the case to be stated, an arbitrator or umpire still should satisfy himself as to its merit and its form before signing it.

In a recent case, Carmichael, J. had cause to comment on the way in which a case was stated. He had this to say in his judgment:

"Considerable effort must have been expended, time spent, and, one would think, expense incurred, in producing the 298 page volume which comprises the Stated Case. A statement of the relevant facts found proved by the arbitrators, plus possibly an annexure of that portion of the evidence which they accepted to support their finding – material which could have been fully set out in one tenth of the pages produced and reproduced for this case – should have been adequate. Whatever may have become the custom in stating cases by arbitrators for the opinion of this Court, I think it proper to remind those responsible for this work of what is set out in Russell on Arbitration, 18th ed. at pp.250 to 252, and to draw their attention to

problems arising from departure from proper practice. Some of those problems are adverted to in Festiniog Railway Company v. Central Electricity Generating Board, 13 P. & C.R. 248, particularly in the reasons of Pearson, L.J. Also noteworthy are the additional remarks of Wilmer, L.J. in Tersons Limited v. Stevenage Development Corporation (1965) 1 Q.B.37 at pp. 446 to 447 where his Lordship covers the proper procedure where the issue is whether there is evidence to support a particular finding." (Dillingham Constructions Pty. Limited v. Qantas Airways Limited (1979) NSWSC.)

The problems and remarks referred to include the following:

"There is a danger of attempts being made to turn questions of fact into questions of law with a view to having them retried by the court with the result that all the objects sought to be attained by means of arbitration -- would be defeated -- " (Pearson, L.J.)

"It seems to me that there may well be exceptional cases where a question is raised whether there is any evidence to support a particular finding in which it may be convenient for an arbitrator to append a short transcript of evidence dealing with that particular point. – But in general it is not to be forgotten that issues of fact are the sole determination of the arbitrator. Where -- the disputed evidence goes to the whole or a principal issue in the case, to append a transcript of a large part of the evidence is merely to invite the Court to retry the issues of fact in the case. This seems to me to cut at the root of the whole purpose of arbitration, the basic idea of which is that the arbitrator's decision shall be final. -- The duty of the arbitrator is to find the facts and not just to set out the evidence. -- His duty, as I see it, is to select that which he regards as the relevant evidence, and to state factually what it amounted to." (Willmer, L.J.)

It is not practical for an arbitrator to state an award in the form of a case stated for the opinion of the Court if there are more than a few legal points to be answered as such an award must state alternative awards, covering every possible combination of answers that the Court may give on the questions raised.

The stated case procedure can be abused by parties who may have had no particular wish to have their arbitration go through the Courts but who see that they are about to lose the arbitration and be ordered to pay a large sum of money to their opponent. Such a party may invite the Arbitrator to state a case to the Court, even if there is no merit in such an application, simply to delay and then spin out the delay by appealing where that is possible. Another possible abuse can be where a party overawes the arbitrator at the threshold of the arbitration and obtains a stated case even before any or sufficient facts are found by the arbitrator. In such cases it is usually asserted that an early case stated will shorten the hearing time and save costs.

Lord Evershed in *Windsor Refrigerator Company Ltd. v. Branch Nominees Ltd.* (1961) said:

> *"I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to the the longest way round."*

Lord Radcliffe in *David v. Abdul Cader* (1963) said:

> *"Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedures. Otherwise the hoped-for shortening of proceedings and savings of costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases."*

In the matter of an arbitration between *F.T. Eastment & Sons Pty. Ltd. and Angus & Coote Pty. Ltd.* the hearing of the reference commenced on 16 February, 1977. At the conclusion of the opening by senior Counsel of the builder's case, and before any other than formal evidence was adduced, the arbitrators, at the request of the proprietor and against the wishes of the builder, stated a case pursuant to s.19 of the N.S.W. Act.

On 12 July, 1978, Meares, J. refused to answer the questions raised in the case and remitted the matter to the arbitrators to proceed with the arbitration and to determine the facts relating to the issues, the subject of the questions. His Honour said in his judgment:

> *"In my opinion questions of law posed to an extent in vacuo and in the absence of any findings of or agreements on facts should only in exceptional circumstances be answered before the questions of fact relating to the particular issue are dealt with, and generally only if it is reasonably clear that if the question of law is answered one way it will either determine all questions between the parties on that issue or will result in less evidence having to be adduced than would otherwise have been the case.*
>
> *A further disadvantage of answering questions of law in vacuo as to the construction of an agreement is that the Court is being asked to construe a particular part of it without fully appreciating the real question at issue. For these reasons the Court's answer may well not supply the answer to a particular difficulty in relation to the clause which really had probably not occurred to it."*

Lord Denning has indicated that using the stated case procedure to gain time or delay the day of a final award being rendered against a party would be improper. Obviously, this would mean that the party seeking the case stated does not do so bona fide. He is acting without proper motive. He also stated that in all cases where the arbitrator or umpire is of opinion that the application is not raised bona fide, but for some ulterior motive he should, of course, refuse it. (Arbitration (Commercial) Law and Practice by Dorter & Widmer, 1979.)

Barwick, C.J., in *Buckley v Bennell Design and Construction Pty. Ltd.* (1978), said:

> *"Courts of first instance need, in my opinion, to be chary of dividing a case so as to attempt first to have determined by an appellate court what is presented as a preliminary point of law and thereafter to determine what I might call the merits or substance of the case. Too often, the suggested preliminary question either does not really arise, or requires the determination of facts to make it of relevance, or, if the question does arise, its resolution fails to be definitive of the rights of the parties. There are, of course, cases which can be disposed of, as it were, on demurrer. But, in my experience, they are very much the exception, rather than the rule. Better, in my opinion, that the court of first instance should decide the whole case at the outset. Its decision may prove acceptable to the parties, even if not satisfying to the academic interests of counsel."*

Commonly it is found that the party who is stronger on "the merits" than the law seeks to avoid the stating of a case or the making of a "speaking award" *(Gold Coast City Council v Canterbury Pipe Lines (Aust.) Pty. Ltd.* (1968).

PROFESSIONAL LIABILITY / OTHER PROFESSIONS

L.E. James

The most significant trend developing in recent years in the field of professional liability has been the tendency of the Courts to hold the professional adviser or consultant responsible not merely for physical injury to his client or damage to his client's property but also for the purely financial consequences of professional work to the person who might be affected by it. This tendency is more obvious in relation to professions other than the legal profession, since the legal profession was always one where such liability as there was affected financial consequences almost exclusively.

The modern law of professional negligence has its conceptual origin in the rule Donoghue v Stevenson (1932) A.C. 562, where it is said that one must take reasonable care to avoid injuring one's neighbours by one's actions. This has been extended by the decision in Hedley Byrne v. Heller & Partners (1964) A.C. 465 into the principle that one must take reasonable care not to cause financial loss to one's neighbour by one's words.