This however did not assist the appellant proprietors. It had been submitted on their behalf that the arbitrator had erred in law in applying Hudson's test to the builder respondent's claim on a quantum meruit since he had taken the view that the claim was neither wildy exaggerated nor one which it was wholly unreasonable for the builder to raise. The Full Court however adopted the view taken by the Judge at first instance that a careful reading of the award showed that the arbitrator had not taken the view that the quantum meruit claim was irrelevant unless it was either wildly exaggerated or raised highly unreasonably.

The second question argued before the Full Court was to whether the arbitrator had erred in law in failing to award costs to the builder only on the County Court scale, given the amount of the award. The arbitrator held that he could not direct the Taxing Master of the Supreme Court to tax costs on the County Court scale. The arbitrator went further and stated that even if he did have power to direct the Taxing Master of the Supreme Court to tax costs on the County Court scale, he would not do so since this would "impose an unjustified penalty on the builder, who, when it is all said and done, is the successful party". It was submitted on behalf of the appellant that the use of the words "an unjustified penalty" showed that the arbitrator erred in law in exercising his discretion. The use of these words did not concern the Court. The Court found that the arbitrator had not erred in law in failing to award costs to the builder only on the County Court scale.

The Court held that leave to appeal had properly been refused at first instance and the appeal to the Full Court was accordingly dismissed.

Importantly, the judgment refers to the decision of *Tadgell J in Bryarley Pty Ltd v Fletcher & Anor* [1992] 2 V.R. 272 (see case note, The Arbitrator, Vol. 11 p.85). The head note of this case states that an arbitrator is not empowered to award costs to be taxed on the County Court scale. The Full Court thought the head note was inaccurate in this respect and left open the question of whether an arbitrator had power to award costs on the County Court scale. This comment has wide spread ramifications for arbitration awards where a party has been successful but only for a very moderate sum. On the basis of the comments made by the Full Court, it may now well be open to an arbitrator to award costs to be taxed by the Supreme Court Taxing Master but on a lower scale.

AWARD NOT IN ACCORDANCE WITH THE EVIDENCE

South Australian Supreme Court, Unreported, Mullighan J, 24 September 1992

Sabemo (SA) Pty Ltd v *AIW Engineering Pty Ltd*

This decision arose out of an arbitration between the appellant builder and the respondent sub-contractor.

One of the matters before the Court was a determination in the award in favour of the respondent for the sum of $50,000 in respect of a variation. The arbitrator found that there was a variation for which the respondent was entitled to be compensated. The respondent claimed the sum of $72,023.66 for the variation. The arbitrator held that the respondent had not adequately proved its entitlement to the sum of $72,023.66. The arbitrator instead substituted the sum of $50,000 which, from his experience in the building industry, was a fair and reasonable sum to allow for the variation. During the course the basis of his estimate and did not give the parties an opportunity to contest it.

Following the English Court of Appeal in *Annie Fox & Ors* v *P.G. Wellfair (In Liquidation)* [1981] 2 Lloyds Rep. 514. His Honour found that the arbitrator had erred in law in not giving the appellant an opportunity to contest the arbitrator's assessment. By using his own expertise as he did, he was in effect giving evidence to himself. Further, this was a breach of the rules of natural justice and amounted to misconduct.

The award for $50,000 in respect of the variation was set aside.

THE ENFORCEABILITY OF MEDIATION AGREEMENTS

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd
(1992) 28 NSW LR 194

Conciliation and mediation have become increasingly popular as means of dispute resolution. As a consequence, a clause is sometimes inserted in agreements requiring the parties to take part in a conciliation or mediation process prior to the commencement of arbitration or Court proceedings. But are such clauses legally enforceable? This issue arose for determination by Giles J in the present case.

The plaintiff was a contractor and the defendant a subcontractor for the construction of dry wall partitions and ceilings on the new Parliament House building in Canberra. Disputes arose and the defendant commenced arbitration proceedings against the plaintiff.

The plaintiff in these proceedings sought a stay of the arbitration proceedings on the basis that the parties had agreed to refer certain matters in dispute to conciliation prior to the arbitration continuing (the arbitrator was also a defendant to the proceedings but followed the normal practice of not participating in the proceedings and submitting to any order save as to costs).

His Honour analysed correspondence and communications between the parties which had taken place and concluded that the parties had agreed to refer various issues to conciliation prior to the arbitration proceedings continuing.