19/4

M NO 189/83

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

IN THE MATTER	of the Arbitration Act 1908
AND	
IN THE MATTER	of an Arbitration thereunder
BETWEEN	THE ATTORNEY-GENERAL for NEW ZEALAND
	Applicant
AND	DOWNER & COMPANY LIMITED a duly incorporated company having its registered office at 108 The Terrace, Wellington, Contractor
	Respondent

338

Hearing: 15 March 1984

Counsel: K Robinson for Applicant
I L McKay and Ms S Freeman-Green for Respondent

Judgment: 17 April 1984

JUDGMENT OF JEFFRIES J

Before the court is a motion for an order that the award of Mr Charles F. Martindale of Wellington, consulting engineer, dated 30 November 1982 in an arbitration involving these parties be remitted to him for reconsideration upon the grounds that the said award is on

the face thereof bad in law in its misconstruction of the contract between the said parties.

The facts are these. By a tender in writing dated 8 March 1977 respondent offered to the Ministry of Works and Development to perform the works known as the Rangipo Tailrace Tunnel for the sum and upon the conditions stated in its tender. Correspondence ensued but the letter of acceptance was sent by the Ministry to respondent dated 12 May 1977.

During the course of construction of the tunnel a dispute arose between the parties as to the sums payable to the respondent on account of market fluctuations in certain wage rates. The dispute was first referred to the supervisor and then to a delegate of the Commissioner of Works, each of whom found against respondent. Faced with this respondent sought successfully to refer the dispute to arbitration. The parties entered into an agreement to arbitrate dated 14 September 1982 whereby they appointed Mr C.F. Martindale to be the sole arbitrator.

The arbitrator entered upon the arbitration and conducted a hearing at which the parties were each represented by counsel and oral evidence was heard with submissions made. At the conclusion of the hearing the arbitrator reserved his decision, which he was to deliver in writing and to which he did annex his reasons with the intention that they should form part of the award.

The arbitrator was asked to answer the following question:-

> "Is the Contractor entitled under the provisions of the contract relating to market fluctuations to be paid escalation on or in respect of the increased remuneration for the hours actually worked in excessively wet conditions as referred to in Recital B of this Agreement."

He answered the question "yes" which clearly enough was in favour of the respondent. Those formalities of the award were contained in a two page document entitled "Final Award" and dated 30 November 1982. Annexed to that document was another headed "Reasons for Final Award" which was 15 pages of careful fact and document analysis apart from the contention of applicant that it contains errors of law.

In May 1983 applicant filed the motion which is before the court and has been referred to earlier in this judgment. The basic facts recorded earlier are extracted from a supporting affidavit with all necessary documents annexed to it. In argument counsel for applicant took the court through the documents which set the foundation for his submission that the arbitrator had made a number of findings which are erroneous and which, either together, or individually, amount to errors of law such as to vitiate his award. He then in argument isolated several statements from the reasons seeking to establish where the arbitrator had made errors.

The first argument of the respondent was a jurisdictional one in that the issue before the arbitrator

was a question of law and it followed that the arbitrator's award was not subject to review by the courts for error of law on the face of the record. Mr McKay based his argument on the first three recitals in the agreement to arbitrate which he said records certain facts which were common ground. The recitals are:-

> A. BY a contract made on or about the 12 May 1977 the Contractor agreed to carry out for the Employer certain works, namely the construction of the Tailrace Tunnel for the Rangipo Power Project, in accordance with certain drawings, specifications and conditions for the sum of $18,912,292.
>
> B. BY reason of excessively wet conditions it became necessary for six hour shifts to be worked without reduction in the daily remuneration paid to the shift workers, so that they continued to be paid by the contractor as if eight hours had been worked.
>
> C. DIFFERENCES have arisen between the parties as to certain monies claimed by the Contractor to be payable under the provisions of the contract relating to market fluctuations, and in particular whether market fluctuations are payable under the contract in respect of the increased remuneration for the hours actually worked by shift workers in excessively wet conditions.

D-H - These recitals set out the history of the dispute and the steps leading to the present arbitration hearing.

It was a basic submission of Mr McKay for the respondent that it was common ground that excessively wet conditions made it necessary for six hour shifts to be worked without reduction in the daily remuneration paid to shift workers who had to be paid as if eight hours had been worked. He further submitted the differences between the parties related not to the extra payments to shift workers but to the question whether or not those extra payments qualified for escalation under the contract provisions for market fluctuations. The argument was not over right to recover but whether the extra payments qualified for escalation. That proposition is clearly spelled out of the single question that was posed for the arbitrator. It is almost purely a question of construction of the contract. It asks whether, in circumstances which were common ground, the contractor had an entitlement under the provisions of the contract. The answer can only turn on the meaning of the contract provisions. There was no dispute or issue of fact. Mr McKay said it was so presented to the arbitrator. The arbitrator was able to give a one word award, for he was not asked to quantify in money. There was some minor disagreement between counsel at the hearing in this court as to what constituted the contract documents but that is not material to the central point. The arbitrator had to decide on the meaning of the contract and his 15 pages of reasons quite conclusively extablish that is the issue he concentrated on.

The point has recently been decided in the Court of Appeal in a case involving the present applicant, namely, Her Majesty's Attorney General v Offshore Mining Co. Ltd, Shell (Petroleum Mining) Ltd, B.P. (Oil Exploration) Company of New Zealand Ltd and Todd Petroleum Mining Co. Ltd, (Unreported C.A. 173/82 - 25 February 1983). In Cooke J's judgment under the heading "The Principle of Non-Interference" is the following paragraph which I adopt as being entirely appropriate to this case:-

> "It is established by many authorities that in cases of general references to arbitration the Court has a jurisdiction at common law to set aside an arbitrator's award for error of law on its face. It is enough to mention the decision of the Privy Council in University of New South Wales v. Max Cooper & Sons Pty Ltd (1979) 35 A.L.R. 219 and the recent judgments in this Court in Manukau City Council v. Fletcher Mainline Ltd (C.A. 70/82; judgment 9 December 1982). This jurisdiction vests in the High Court in New Zealand by virtue of the Judicature Act 1908, s.16. Both sides here accept that, although not all the provisions of the Arbitration Act 1908 applied to the reference to Mr Wallace, his decision is an arbitrator's award in the eyes of the common law. Consequently it is also common ground that, if there were an error of law on its face, the decision could be set aside unless, as White J. has held, the case should be classified as one in which a specific question of law has

> been submitted to the arbitrator. In that special class of cases it is settled that error on a question specifically submitted, such as a question of the interpretation of a contract, even though apparent on the face of the award will not justify the Court's intervention; there must be some more fundamental illegality, of a type which is not alleged to have occurred here: see Kelantan Government v. Duff Development Co. 1923 A.C. 395, 408-11 per Viscount Cave L.C."

Mr Robinson sought to distinguish this case as authority on the grounds that the parties both recognised that there were questions of fact to be determined, or inferences of fact to be drawn, before the arbitrator could address himself to any question of construction of the contract. Acknowledging that the parties can submit a question of law to an arbitrator for decision the courts should be slow to find they have done so. With respect the court does not accept either proposition. Because the question of construction of the contract is examined against the canvas of the factual situation does not attenuate the central point it still was a question of construction of a contract. The parties submitted that single question which was answered by one word, and if the courts are currently moving in the common law in any direction it is towards finality of awards by arbitrators rather than interference. The English Arbitration Act 1979 by s 1 made major changes to the common law whereby courts could set aside awards for errors on the face of the award and the special case procedures. We in New Zealand have not had the financial impetus, as did the

English, to reform the law by statute in relation to the court's role. Nevertheless the common law should not be slow to pick up movements elsewhere.

The motion is dismissed and the respondent is awarded $1,000 costs and disbursements.

Solicitors for Applicant: Crown Law Office, Wellington

Solicitors for Respondent: Young Swan Morison McKay