[ZEKIA, P., TRIANTAFYLLIDES & JOSEPHIDES, JJ.]

CHARALAMBOS GALATIS,

Appellant-Plaintiff,

v.

SOFRONIOS SAVVIDES AND ANOTHER,

Respondents-Defendants.

(*Civil Appeal No.* 4543)

Arbitration-- Award- Setting aside- Arbitrator--Expert arbitrator -- Duties--Misconduct -An arbitrator appointed because of his knowledge and experience of the trade may make use of his own knowledge on many matters without hearing witnesses— However, he is prohibited from violating the rules of natural justice- -And hearing or consulting interested parties, persons or witnesses in the absence of the other--In this case in the absence of the respondent- Especially when the person so heard or consulted was the very person in this case the supervising architect, whose decision and certificate as to the work done by the appellant contractor was disputed by the respondents--The right approach to the question of setting aside an award on grounds of irregularity in procedure or infringement of the rules of natural justice.

Award--Severability of award--Setting aside only that part thereof which is bad - The Arbitration Law, Cap. 4 *sections* 8 *and* 20 (2) *and the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 37.

This is an appeal by the plaintiff from the order of the District Court of Limassol setting aside the award of an arbitrator on the ground of misconduct. The application in which the said order was made was based on section 20 (2) of the Arbitration Law, Cap. 4 and section 37 of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960).

The appellant who is a building contractor, was the plaintiff in an action, instituted in the District Court of Limassol, whereby he was claiming the sum of £691.221 mils as balance due to him under a building Contract by the respondents who are husband and wife. After the filing of the action and the statement of claim, the Court by consent stayed the proceedings under section 8 of Cap. 4 (*supra*) and referred the action

1965
Oct 20
1966
Feb 24

CHARALAMBOS GAVALAS
v
SOTIROSIOS SAVVIDES AND ANOTHER

to the arbitration of N R , a civil engineer and building contractor and directed that the arbitrator should not be bound by any previous finding of respondents' architect N L The plaintiff's claim for £691 721 mils was based on the final certificate of the supervising architect the said N L Out of that sum the respondents disputed only the sum of £331 151 mils for which they counterclaimed in due course On the 4th November, 1961, the arbitrator filed his award whereby he awarded to the plaintiff appellant the sum of £670 It appears that the arbitrator consulted the supervising architect the said N L in the absence of the parties

The respondents, dissatisfied with this award filed on the 15th November, 1961, an application to the District Court, of Limassol under section 20 (2) Cap 4 and section 37 of the Courts of Justice Law 1960 (*supra*) for an order to set aside the award on the ground that the arbitration proceedings were misconducted and irregular

The trial Court, relying on the statement of the arbitrator in his award that he consulted the supervising architect N L and on the statement in his affidavit that he called the said architect who gave him details of the work done by the plaintiff under contract and of the extra work found that he did so in the absence of the respondents The trial Court held this amounted to misconduct on the part of the arbitrator and, on the authority of *Harter* v *Shelton* (1844) 13 L T (N S) 466 set aside the award

Section 20 (2) of the Arbitration Law, Cap 4 provides

> 20 (1) (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured the Court may set the award aside '

On the appeal by the plaintiff-contractor against that order setting aside the said award, the Supreme Court

Held (1) (a) we accept the principle that where a person is appointed as arbitrator in view of his knowledge and experience in the trade as in this case -it is not necessary for him to examine witnesses on certain matters as he knows sufficiently of the subject to decide properly without examining them

(b) But, although an expert arbitrator who has been appointed because of his knowledge and experience of the

trade may make use of his own knowledge and experience on many matters, such as quality, without having witnesses called before him, he is, nevertheless, prohibited from violating the rules of natural justice, that is, hearing interested parties, persons or witnesses, in the absence of the other.

(2) In the Eads' case (*infra*), concerning the valuation of a lease, one of the arbitrators relied on information which he received from his grandson who went down the mine : and the Court held that it was not incumbent on the arbitrator to go down himself and that it was not fatal that he relied on the report of his grandson. But in the arbitration with which we are concerned in this appeal, the arbitrator did not obtain information from an outsider regarding the state of property or something similar. He consulted the very person (the supervising architect) whose decision as to the amount of work done by the contractor was challenged by the respondents, and he did so in their absence.

Principles laid down in the *Mediterranean and Eastern Export Co. Ltd. v. Fortress Fabrics (Manchester)* Ltd [1948] 2 All E.R. 186, at p. 189 per Lord Goddard, C.J. and in *the London Export Corporation, Ltd. v. Coffee Roasting Co.Ltd* [1958] 2 All E.R. 411, at p. 416, per Jenkins L.J., *applied.*

(3) Applying those general principles to the present case, we are of the view that the trial Court came to a right conclusion, that is, that the conduct of the arbitrator in consulting the supervising architect, otherwise than in the presence of the parties amounted to misconduct within the provision of the law.

(4) (a) The question now arises should the award be set aside wholly or in part? It is a well-established principle that where there are two matters in an award which are entirely severable then the whole award need not be set aside but only that part which is bad. This principle was applied not long ago in the case of *Prestige and Co. Ltd:* v. *Brettell* [1938] 4 All E.R. 346, at p. 352.

(b) In this case the appellant's claim was for £691.221 mils balance due of building contract and extra work done. Out of that sum the respondents only disputed the sum of £331.151 mils, for which they have set up a counterclaim as it appears in the statement delivered to the arbitrator. So, even if the arbitrator had accepted the respondents' counterclaim of

£331 151 in full the appellant would still be entitled to judgment for the difference or £338 849 mils which we consider is severable.

(5) In the result:

(a) the award in respect of £331 151 (the respondents' counterclaim) is set aside and the matter will have to be heard *de novo*.

(b) Judgment is entered for the appellant (plaintiff) in the sum of £338 849 as above plus interest thereon at the rate of 4% per annum from the date of the award to the 4th November, 1961.

Appeal allowed in part. Judgment in terms. The respondents to pay to the appellant half his costs here and in the Court below.

Cases referred to:

Harvey v. *Shelton* (1844) 13 L. J. Eq. (N.S.) 466;

Mediterranean and Eastern Export Co. Ltd. v. *Fortress Fabrics (Manchester) Ltd.* [1948] 2 All E.R. 186;

Lads v. *Williams* (1854) 21 L.J. Ch. 531, now reported in [1843-1860] All E.R. Rep. 917;

Drew v. *Drew* (1855) 2 Macq. 1 at p. 3, per Lord Cranworth, L.C.;

Wright v. *Howson* (1888) 4 T.L.R. 386;

Jordeson and Co. v. *Stora et Aktiebolag* (1931) 41 Ll. L. Rep. 201, at p. 204;

London Export Corporation Ltd. v. *Jubilee Coffee Roasting Co. Ltd.* [1958] 2 All E.R. 411;

Prestige and Co. v. *Bretell* [1938] 4 All E.R. 346 at p. 352.

Appeal.

Appeal against the judgment of the District Court of Limassol (Loizou P.D.C. and Malachtos D.J.) dated the 10th August, 1965, (Action No. 1132/61) setting aside the award of the arbitrator on the ground of misconduct.

Sir Panayiotis Cacoyiannis, for the appellant.

X. Clerides with *S.G. Michaide*, for the respondents.

Cur. adv. vult.

ZEKIA, P. : The judgment of the Court will be delivered by Mr. Justice Josephides.

JOSEPHIDES, J. : This is an appeal by the plaintiff from the order of the District Court of Limassol setting aside the award of an arbitrator on the ground of misconduct. The application in which the order was made was based on section 20 (2) of the Arbitration Law, Cap. 4, and section 37 of the Courts of Justice Law, 1960

The appellant, who is a building contractor, was the plaintiff in an action claiming the sum of £691.221 mils as balance due to him under a building contract by the respondents who are husband and wife. After the filing of the action and the statement of claim (on a specially indorsed writ) and before the defence was filed, the respondents (defendants) applied to the Court under the provisions of section 8 of the Arbitration Law for an order staying the proceedings on the ground that there was provision in the building contract for the reference to arbitration of the matters in dispute in the action.

There being no opposition on the part of the appellant (plaintiff), the Court by consent stayed the proceedings, referred the action to the arbitration of Mr. Nicolas E. Roussos of Limassol, and directed that he should not be bound by any previous finding of respondents' architect. The said Roussos, who was a civil engineer and building contractor, was the person agreed upon by the parties to be their arbitrator. The plaintiff's claim of £691.221 mils was for the balance of a sum due under a building contract, including extra work, on the strength of the final certificate of the supervising architect, Mr. Nicos Lagoudis.

On the 4th November, 1961, the arbitrator filed his award whereby he awarded the sum of £670 to the appellant (plaintiff). The material part of the award reads as follows :

> " After consulting the Architect Mr. N. Lagoudis and meeting the plaintiff and defendants on three occasions examining their differences in every detail, I come to the following conclusion :
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> | | |
> |---|---|
> | Value of Contract | £6,900.000 mils |
> | Additional work | 1,735.000 mils |
> | Total value of contract | £8,635.000 mils |
> | Deduction for work not carried out | 370.000 mils |
> | | £8,265.000 mils |
> | Payments on account | £7,595.000 mils |
> | Amount due to the Contractor | £ 670.000 mils" |

1965
Oct. 20
1966
Feb. 24

CHRISTAMBOS CHRISTIS
v.
SOTIROUDIS SAVVIDIS AND ANOTHER

On the 15th November, 1961, the respondents (defendants) filed their application for an order of the District Court to set aside the award on the ground that the arbitration proceedings were misconducted and irregular

The grounds on which the application was based were set out in the affidavit sworn by the first respondent (defendant), the material part of which reads as follows

"3 The proceedings were irregular and misconducted inasmuch as evidence was taken by the arbitrator from a witness, not called by me, and in my absence, and it was upon the evidence of that witness that the arbitrator made his award I was given no opportunity of cross-examining that witness The witness in question was the architect, N Lagoudis, who was an interested party and whose very findings gave rise to these arbitration proceedings

4 The arbitrator failed to conduct the proceedings in a judicial manner He did not allow me to give my evidence correctly, but only asked me a number of questions I was not subjected to cross-examination but the other party was invited to comment upon my evidence The truth of my evidence and of the other party was therefore untested

5 The rules of evidence were not observed

6 To the best of my knowledge, no note of the evidence such as it was, was recorded at the time Further, present at the only meeting (there was only one, not three as stated by the arbitrator in his award) was the arbitrator's clerk who interrupted the proceedings by agreeing with the comments passed by the arbitrator, when so requested

7 The arbitrator refused to visit the construction in question but stated he would visit and inspect only the water installations This to the best of my knowledge he never did

8 Part of the matter in dispute was the question of compensation payable for delay in finishing the work The arbitrator did not deal with this question at all

9 Not only did the arbitrator see the architect behind my back, he stated to me on 5th July and on other

dates that he had also seen the other party about the case. I do not know what took place at this meeting or meetings.

10. On the 7th November, 1961, after being notified that the award had been filed in Court, I called on the arbitrator for the return of the various documents I had left with him for the case. To the best of my knowledge and memory he said to me the following words or words having a similar meaning : 'I believed what you said to me but I could not act upon that because I had to base my report on what the architect said'.

11. Further, no evidence on oath was given at any time. I do not know what documents were produced to the arbitrator for or during the proceedings or in my absence or what report was given by the architect to the arbitrator ; I was not asked what witnesses I had or wanted to call and I was also, therefore, unable to present my case as fully as it merited".

The appellant (plaintiff) opposed the application and applied that judgment be entered in the terms of the award. The appellant's opposition was supported by an affidavit sworn on the 6th December, 1961, by the arbitrator (Roussos) who died on the 23rd March, 1963, without giving evidence in these proceedings. In view of his death we think that the whole of his affidavit should be quoted in this judgment :

"1. I am a qualified Civil Engineer with a long experience as a Civil Engineer and as a building contractor in Cyprus.

2. On the 1.7.1961 on the application and at the request of both litigants, I was appointed by virtue of an order of the District Court of Limassol under the provisions of the terms of the building contract dated 2.9.59 between the litigants, to go into and determine the dispute in the building contract which arose between the plaintiff and the defendants according to the provisions of article 14 of the said contract.

3. I repeatedly summoned both the litigants who appeared before me and they gave a detailed statement to me regarding their dispute and the claim of each one of them against each other of them, each one of the litigants having handed to me in writing his relative claim and dispute.

I also summoned the supervising architect Mr. N. Lagoudis referred to in the contract who gave me particulars of the work executed by the building contractor-plaintiff under the said contract and of the extra work executed by plaintiff.

I visited the premises and I examined the plans, the specifications and conditions of the said contract and I determined the dispute and claims referred to me under the provisions of the said contract and I gave my award which I filed in Court

4. I also went into defendants' claim for damages due to the delay in the completion of the work and I found that defendants were not entitled to such damages because plaintiff on the instructions of the defendants executed extra work in connection with the said premises, of a value of £1735 and the execution thereof required additional considerable time which was not specified in the contract nor was there any agreement specifying the time of execution of such extra work.

5. All the facts alleged in the affidavit of the defendant which contradict or are inconsistent with this affidavit are not accepted".

It is common ground that the respondents delivered to the arbitrator on the 7th August, 1961, a statement giving full particulars of their claims against the appellant. This statement was put in evidence as Exhibit 1 before the trial Court and it shows that the respondents claim of £331.151 mils is composed of items of work omitted to be performed by the contractor (appellant) and of a claim for damages for delay. This figure is made up of 22 items as follows :

(a) Item 21--damages for four months' delay in completing the work as originally agreed, at £45 per month	£180.000 mils
(b) Items 1 to 20 and item 22--various items of work not performed or material not supplied by the contractor	£151.151 mils
Total	£331.151 mils

It will thus be seen that out of the sum of £691.221, claimed by the appellant in his statement of claim as balance of the building contract and extra work the respondents only disputed the sum of £331.151 mils

Only the two respondents gave evidence before the trial Court and no witnesses were called by the appellant as the arbitrator, who was about to be called after the adjournment of the case, was taken seriously ill and he never recovered. The main witness was the first respondent (the husband) and he more or less repeated the contents of his affidavit amplifying it in certain respects.

As regards his conversation with the arbitrator he stated that on the 7th November, 1961, that is, after the filing of the award, he called at the arbitrator's office in order to collect certain documents and that the arbitrator told him that he (the arbitrator) fully agreed with what he (the first respondent) had stated to him but that he could not act upon it as he based himself on Mr. Lagoudis's (the supervising architect's) report. Subsequently, the arbitrator informed the first respondent that he did not have any written statement from Mr. Lagoudis. The only complaint of the respondents against the arbitrator was that he misconducted the proceedings and they did not impute to him any dishonesty or bad faith.

The trial Court found that the arbitrator had been appointed in view of his expert knowledge of the matters in dispute and that consequently he was entitled to make use of his expert knowledge for the purpose of supplying any deficiency in the material placed before him. They were further of the view that the fact that no expert witnesses were called by either side was another indication in support of that proposition. Although the respondents before us disputed the fact that the arbitrator was appointed in view of his expert knowledge we are satisfied that that is not so.

The trial Court, relying on the statement of the arbitrator in his award that he consulted the supervising architect, Lagoudis, and on the statement in his affidavit (paragraph 3) that he called the said architect who gave him details of the work done by the plaintiff under the contract and of the extra work, found that he did so in the absence of the respondents. The Court held that this amounted to misconduct on the part of the arbitrator and, on the authority of *Harvey* v. *Shelton* (1844) 13 L.J. Eq. (N.S.) 466, set aside the award.

The appeal was very ably argued before us on one ground, namely, that the trial Court misdirected itself as to the law and the legal principles applicable in the case, having regard to the facts found by the Court. Sir Panayioti Cacoyanni argued that, as the Court was concerned with the case of an

arbitrator skilled in the trade, appointed in view of his expert knowledge, the arbitration should be distinguished from that conducted by an ordinary arbitrator. He further submitted that a skilled arbitrator was entitled to consult persons who could give valuable information. In support of his submission counsel cited the case of *Mediterranean and Eastern Export Co., Ltd.* v. *Fortress Fabrics (Manchester) Ltd.* [1948] 2 All E.R. 186; Russell on Arbitration, 17th edition, at page 143; and he relied mainly on the case of *Eads* v. *Williams* (1854) 24 L.J. Ch. 531, now reported in [1843-60] All E.R. Rep. 917.

On the other hand, respondents' counsel submitted that the arbitrator based himself on information received from Lagoudis who was the man whose decision was not accepted and, in fact, was challenged by the respondents. He was the supervising architect on whose final certificate the appellant based his claim of £691 which respondents denied, and the matter had to be taken to Court and eventually referred to arbitration. Respondents' complaint was that Lagoudis was consulted by the arbitrator in the absence of the respondents. Counsel finally submitted that the arbitrator did not consult an independent person to obtain some information to help him in assessing the value of some work or material but he consulted a person who was highly involved in the case.

The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he must observe in this the ordinary well-understood rules for the administration of justice. The arbitrator must not hear one party or his witnesses in the absence of the other party or his representative except in few cases, where exceptions are unavoidable, both sides must be heard and each in the presence of the other: see *Harvey* v. *Shelton* (1844), *supra*, to which we shall revert later. The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings: *Drew* v. *Drew* (1855) 2 Macq. 1, at page 3, per Lord Cranworth, L.C. There would seem to be an established practice for the umpire in commercial "quality arbitrations" to depart from this rule: An arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only (*Wright* v. *Howson* (1888) 4 T.L.R. 386). Similarly an

umpire expert in the timber trade properly decided a dispute as to quality on his own inspection (*Jordeson & Co v Stora etc Aktiebolag* (1931) 41 Ll L Rep 201, at page 204)

In *Lads v Williams* (1854), *supra, inter alia*, one of the two referees had not inspected the mine himself, but had relied on the report of another the referees examined none of the witnesses who were available, they did not form their own judgment, but relied on the opinion of the umpire It was held that it was not incumbent on the referees either to inspect the mine themselves or to examine the witnesses but it was, however, a valid objection that one of the referees accepted the view of the umpire without forming an opinion of his own This case was strongly relied upon by appellant's counsel and for this reason we shall consider it in some detail It is convenient here to state that we accept the principle that where a person is appointed as arbitrator in view of his knowledge and experience in the trade it is not necessary for him to examine witnesses as he knows sufficiently of the subject to decide properly without examining them In the course of his judgment Lord Cranworth L C said (at page 920 of the All E R Reprint)

> I am not prepared to say whether it would be a valid objection merely that Mr Haines (one of the arbitrators) did not go down the mine himself, but left it to his grandson, because, when you are forming a judgment as to the value of anything you necessarily proceed in a great measure on the report of others If a person is to value an estate, nobody intends that he shall examine every rood of land He takes a cursory view, examines it here and there, he knowing the land and the neighbourhood, he asks some questions, and is in some respects guided by them Therefore I do not think that it was incumbent on Mr Haines to go down himself, and I do not think that it is fatal that he relied on the report of his grandson'

It will be seen that the *Lads* case concerned the valuation of a lease, and that one of the arbitrators relied on information which he received from his grandson who went down the mine; and the Court held that it was not incumbent on the arbitrator to go down himself and that it was not fatal that he relied on the report of his grandson But in the arbitration with which we are concerned in this appeal, the arbitrator did not obtain information from an outsider regarding

the state of property or something similar. He consulted the very person (the supervising architect) whose decision as to the amount of work done by the contractor was challenged by the respondents, and he did this in their absence.

Further on in his judgment Lord Cranworth, L.C., says (at page 920 of the same Report) :

> "The result of the evidence is that Mr. Haines, the referee, was guided either entirely or mainly by the report of his grandson, coupled with his own fifty years knowledge of the neighbourhood, which of itself, I think, was quite a legitimate ground to entitle him to sign an award. But what the other referee says is not that he consulted Mr. Peacock (the umpire) but was satisfied with his decision on it as being worth £400 an acre. Mr. Peacock had valued it at £400 and though Mr. Haines did not think it worth £200, he concurred with the other because he thought it no use differing.
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> That is not an award to which the persons who had agreed to make the reference were bound. They were entitled to have the unbiased judgment of the two ; or, if the two could not concur, then the unbiased judgment of the third, acting, not in a loose way, but giving an opinion deciding judicially on that which it had become his duty to decide; I think that was an objection to the award".

It will be observed that great stress is laid on the necessity of forming one's own unbiased judgment and not relying on the opinion of others.

Another case to the point is the *Mediterranean and Eastern Export Co. Ltd. v. Fortress Fabrics (Manchester) Ltd.*, [1948] 2 All E.R. 186. In that case the buyers of textile goods refused to accept them on the ground that they were not up to sample, but were unmerchantable and unfit for the purpose for which they were supplied. The dispute was referred to arbitration in accordance with the rules of a chamber of commerce which provided for the determination of such disputes "by commercial men of experience and special knowledge of the subject-matter". The parties submitted statements to the arbitrator in accordance with the rules but neither of them called expert evidence or had professional representation at the hearing.

Lord Goddard, C.J. applying the principles laid down in earlier cases (*Wright* v. *Howson* (1888) 4 T.L.R. 386, 387 ; *Eads* v. *Williams* (1854), *supra*; and *Jordeson & Co.* v. *Stora etc. Aktiebolag* (1931) 41 Lloyds L.R. 201, 203), *inter alia*, held that the arbitrator, having been appointed because of his knowledge and experience of the trade, was entitled to fix the damages without hearing expert evidence thereon. The following extract from Lord Goddard's judgment in the *Mediterranean* etc. case is significant (at page 189) :

> " It must be taken, I think, that in fixing the amount that he has, he has acted on his own knowledge and experience The day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice, the Courts should be slow indeed to set aside his award ".

It will be observed that one of the fundamental principles laid down by Lord Goddard is the observance of the rules of natural justice, that is to say, that a skilled arbitrator must not hear one party or his witnesses in the absence of the other party or his representative and that each party must be given an opportunity of presenting his case.

In the *London Export Corporation, Ltd.* v. *Jubilee Coffee Roasting Co. Ltd.* [1958] 2 All E.R. 411, a dispute arose out of a contract for the sale of ground nuts which was referred to arbitration under an arbitration clause in the contract and, the arbitrators being unable to agree, to an umpire. An appeal from the umpire's award was taken to the board of appeal constituted in accordance with the regulations of the Incorporated Oil Seed Association. The nature of the misconduct of the arbitrator complained of by the buyers was the following : It appears that for a matter of fifty years on any appeal to the board of appeal it had been the practice for the parties or those representing them to withdraw at the end of the hearing but for the umpire to remain with the board if they requested him to do so. It was stated that the object of that arrangement was to enable the umpire to tell the board whether the contentions raised before the board were

the same as those raised before him, and also to tell the board what were the reasons for his decision. In this particular case that practice was followed and a director of the buyers, who represented them in this matter, unsuccessfully protested. It was stated that the conduct of the board in conferring with the umpire, otherwise than in the presence of the parties, was, in the technical sense, "misconduct", and sufficed to invalidate the award. That contention was accepted by the trial Judge and upheld by the Court of Appeal.

Jenkins L.J. in his judgment (at page 416) said

> "As to the law one can start with the principle that in the absence of some agreement between the parties to a submission such as this, either express or implied, conduct such as the appeal board's conduct in the present case in giving private audience to the umpire and conferring with him in the absence of the parties, would undoubtedly, have amounted to misconduct and would have sufficed to invalidate the award. I think that that has never been disputed"

In the arbitration agreement it was provided that the umpire and any person closely connected with him in business was not to be a member of the appeal board or have any voice in its selection

Diplock, J., who heard the case in the first instance, said in this connection ([1958] 1 All E.R., at page 501):

> "I think that it is a necessary implication from this that the umpire is to have no influence, direct or indirect, on the board of appeal in reaching its decision, and that the board of appeal have no right to seek any information, whether of fact or of opinion, from him in the absence of the parties or to allow him to attend their deliberations after the conclusion of the hearing"

The principle laid down in the *London Export Corporation* case is that the arbitrator should not be influenced directly or indirectly in reaching his decision by any person in the absence of the parties, and that the arbitrator has no right to seek any information, whether of fact or of opinion, from another person in the absence of the parties, or to allow him to attend his deliberations after the conclusion of the hearing.

The trial Court in the present case in reaching its decision relied on the case of *Harvey v. Shelton* (1844) 13 L.J. Eq. (N.S.)

466, but learned counsel for the appellant submitted that that case was distinguishable from the present one on the ground that the arbitrator in the *Harvey* case was not a person of skill and experience, that he consulted one interested party without giving the opportunity to the other to explain and, as a result, he awarded substantial amounts to the party whom he consulted. With great respect we think that the Harvey case went much further than that and that it laid down certain definite principles. The headnote reads as follows :

> "A submission to arbitration was entered into by A. and B. of all matters in difference between them. The arbitrator gave due notice to the parties of his intention to hold a meeting on the 26th of September, which was holden, and attended by one of the parties, and the solicitor of the other party. The parties met on the following day before the arbitrator, who, after hearing both parties, and with their consent, took with him all the books, & c for the examination of an accountant. Shortly afterwards, and before making his award, the arbitrator was apprised by the accountant of a supposed error in the accounts, as to a sum of money, upon which the arbitrator summoned A, who was more conversant with the accounts than B, to appear before him and the accountant, when the supposed error was explained and set right to the arbitrator's satisfaction. About a month afterwards, the accountant again discovered in the accounts what he supposed an error, as to a sum of money, which was explained by A. in like manner as before, to the satisfaction of the arbitrator ; but in both instances no notice was given to the other party, B. of A's intended attendance on the arbitrator. The arbitrator shortly afterwards made his award :—the award was ordered to be set aside".

It was also held that the same course of proceeding ought to take place in mercantile as in other references to arbitration ; and that private communications ought on no account be made to an arbitrator by a party previously to the making of his award.

The following is the material part from the judgment of the Master of the Rolls in the *Harvey* case (at page 469). It should be stated that Norris, whose name is mentioned in the judgment, was an accountant who had been entrusted by the arbitrator with the examination of the books of the parties with their approval :

' Norris had a difficulty about an item in the accounts of £350 This circumstance having been stated to the arbitrator by Norris, the arbitrator summoned Shelton to attend him, for the purpose of explaining the apparent error , and it is to be regretted that the arbitrator did not at the same time summon Harvey to attend him with Shelton Shelton having attended the arbitrator, the matter is satisfactorily explained It does not appear how the result prejudices Harvey, but we have the arbitrator seeking and obtaining a private interview with one of the parties materially interested in the subject-matter of the award, which is always most objectionable The like proceedings take place with reference to another sum, as to which differences might have existed, and Shelton is again summoned by the arbitrator to attend him Shelton has a private interview with the arbitrator, and explanations are given by Shelton, and the arbitrator is satisfied therewith, and Harvey becomes bound thereby This course of proceeding was very improper, for no one ought to use means likely to affect the mind of a person acting in a judicial character , and it is absurd to say a different course of proceeding is allowed in mercantile references to that which is pursued in other references and I repudiate any such notion One party, in cases of this nature, cannot be allowed to use the means of influence not known to his opponent It is argued that the two parties are in equal fault, and it is reported that Lord Eldon said, if a fact of this kind be brought forward, the guilty party cannot be heard to make the complaint , and in the present case the acts of Shelton were not spontaneous ones on his part What Harvey states is mainly denied by the other side His statement is, that he was desirous there should be a meeting at which all parties could attend the arbitrator , but this is distinctly contradicted by the other side Then there is the letter of the 19th of January 1844, written by Harvey to the arbitrator, which I cannot advert to without making the observation, that it was extremely improper in Harvey to write the same My rule is to hand over all communications made to me in a cause by one party, to the opposite party The last proceeding here is the interview between the arbitrator and Harvey, when the former stated to the latter that all was right, and he should shortly make his award This is a matter in which justice is concerned, and not a matter merely

between the parties who are litigant, but one which concerns the public I am not satisfied the arbitrator in this case went beyond the power incident to his office, but he deviated from the course which justice demands

Award ordered to be set aside, but without costs"

That extract from the judgment of the Master of the Rolls speaks for itself and we need not summarise it Suffice it to say that it does not depart from the general principles of arbitration laid down in other cases to which we have referred earlier in this judgment, that is to say, that although an expert arbitrator who has been appointed because of his knowledge and experience of the trade may make use of his own knowledge and experience on many matters, such as quality, without having witnesses called before him, he is prohibited from violating the rules of natural justice, that is, hearing interested parties, persons or witnesses in the absence of the other party

Applying those general principles to the present case we are of the view that the trial Court came to a right conclusion, that is, that the conduct of the arbitrator in consulting the supervising architect, otherwise than in the presense of the parties, amounted to misconduct within the provisions of the law

The question now arises should the award be set aside wholly or in part? It is a well-established principle that where there are two matters in an award which are entirely severable then the whole award need not be set aside but only that part which is bad This principle was applied not long ago in the case of *Prestige & Co v Brettell* [1938] 4 All E R 346, at page 352, where it was held that the award was severable and the fact that the award was bad with regard to £3,167 did not affect the award with regard to £7,500

In this case the appellant's claim was for £691 221 mils balance of building contract and extra work and the counterclaim of the respondents as appearing in the statement delivered to the arbitrator (exhibit 1) amounted to £331 151 mils made up as follows

(a) for four months delay in completing the work £180

(b) for work omitted to be performed by the appellant . £151 151 mils

The arbitrator after taking all these into consideration awarded the sum of £670 to the appellant. Even if the arbitrator had accepted the respondents' counterclaim of £331.151 mils in full the appellant would still be entitled to judgment for the difference of £338.849 mils, which we consider is severable.

The next question which we have to determine is whether the award should be set aside in respect of the whole counterclaim of the respondents, that is, £331.151 mils or only in respect of item (b) above, that is, the work omitted to be done

With regard to item (a), the four months' delay, the arbitrator in his affidavit (paragraph 4) stated that the respondents were not entitled to any damages because the appellant on their instructions executed extra work amounting to £1,735 and "the execution thereof required additional considerable time which was not specified in the contract nor was there any agreement specifying the time of execution of such extra work". The trial Court in their judgment said that as regards the respondents' claim for damages for delay "the arbitrator was, in our view, legally right in forming the opinion that the applicants (respondents in this appeal) were not entitled to any such damages in view of the extra work that had been performed at their request".

Now, considering the view we have taken that the arbitrator has violated fundamental rules of natural justice in consulting the supervising architect in the absence of the respondents by seeking information from him, we do not think that the Court can enter into the question whether the finding of the arbitrator on the question of delay was justified or not. For this reason, we are of opinion that the award should be set aside in respect of the whole counterclaim of the respondents amounting to £331.151 mils, subject to this qualification: it seems that out of the respondents' counterclaim of £331.151 mils the arbitrator allowed him £21.221 mils (and rejected the balance) and thus reduced the appellant's claim of £691.221 mils to £670 and awarded him that sum. The sum of £21.221 mils should, therefore, be taken into account in appellant's favour when the respondents' counterclaim of £331.151 mils is retried.

In the result the appeal is allowed in part and the judgment of the District Court modified as follows:

(a) the award in respect of £331.151 mils (the respondents' counterclaim) is set aside and the matter will have to be heard *de novo*, subject to the above qualification ;

(b) judgment is entered for the plaintiff (appellant) in the sum of £338.849 mils plus interest at the rate of 4% p.a. from the date of the award, i.e. the 4th November, 1961.

With regard to costs we think that, in the circumstances of this case, the respondents should pay to the appellant half his costs here and in the Court below.

Appeal allowed in part. Judgment in terms. Order as to costs as aforesaid.