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25 pages

NATOLI v WALKER - (1994) 217 ALR 201

SUPREME COURT OF NEW SOUTH WALES -- COURT OF APPEAL
Kirby P, Mahoney and Meagher JJA

5 April, 26 May 1994
-- Sydney

Arbitration -- Awards -- Whether manifest error of law on face of award -- Application of test of "manifest error" -- Appropriate exercise of power to appeal arbitral award conferred by Commercial Arbitration Act 1984 (NSW) -- (NSW) Commercial Arbitration Act 1984 s 38.

On 12 March 1989, Dr Keith Walker (the proprietor) entered into a building contract with Mr Sam Natoli (the builder) to carry out works on the proprietor's property in Bellevue Hill. The proprietor repudiated the contract on 13 December 1990 after disputes broke out. The arbitrators found that the proprietor was obliged to pay the builder $33,643.40 with interest. Leave to appeal the arbitral award rested on three items relating to the proprietor's entitlement to claim against the builder. These items were whether the agreed contract price included the cost of works undertaken by nominated subcontractors, whether the agreement required the builder to perform painting work and whether the builder was liable to pay liquidated damages in the event of non completion of the works by the required date, 12 September 1989.

Held, per Kirby P and Mahoney JA (Meagher JA dissenting) allowing the appeal:

(i) Amendments to s 38 of the Commercial Arbitration Act 1984 (NSW) had the purpose of confining the instances where leave to appeal an arbitral award would be granted, namely, to "question[s] of law arising out [of] an award": s 38(2). That is, leave to appeal an arbitral award should not be readily given.

(ii) None of the three points argued before Rolfe J demonstrated a "manifest error of law on the face of the award" being issues of fact determinable by the arbitrator.

(iii) Per Kirby P: Comparable United States authority shows that restraint in the application of the test of "manifest error" is appropriate in New South Wales following the criteria enumerated in the Commercial Arbitration Act.

(iv) Per Kirby P: Leave to appeal may be granted in cases of "clear and simple oversight by the arbitrator of the principle of law".

(v) Per Mahoney JA: Even if construed as errors of law, the issues raised in the appeal were not manifest errors.

Appeal

This was an appeal from an earlier decision to, in part, grant leave to appeal an arbitral award and other ancilliary relief granted to the proprietor under the Commecial Arbitration Act 1984 (NSW).

MS Jacobs QC and *J Amor Smith* instructed by *Milios and Co* for the appellant.

BW Walker SC and *J Harvey* instructed by *L E Edwards and Co* for the respondent.

Kirby P.

Before the court are an appeal and cross-appeal from a judgment entered by Rolfe J, administering the Construction List of the Common Law Division of the Supreme Court.

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Protracted litigation following an arbitral award by arbitrators

These proceedings represent the fifth level in the hearings concerning the litigation of the disputes between the parties. Their journey to this court began in a hearing before two arbitrators (a builder and an architect) who made an award to resolve their dispute. An application was then successfully made before Rolfe J to secure leave to appeal against the award. The appeal was then heard, in the course of which his Honour revoked, in part, his earlier grant of leave. Application for leave to appeal was then made to this court. It was granted in part. Certain grounds of appeal relating to the name of the appellant were excluded And now this court has heard and determines the appeal.

The arbitrators found that the proprietor was obliged to pay the builder $33,643.40 plus interest. Following the two hearings before Rolfe J, the award was varied so that the builder was ordered to pay the proprietor $18,432.54 plus interest and certain costs. The lump sum contract between the parties required the builder to perform alterations and additions to the proprietor's home for $175,175. The result of the hearing before the arbitrators and the primary judge has been a change in the determination of the respective liabilities of the parties. The change is of relatively modest proportion viewed either absolutely or in relation to the original contract between them. It does not take too much imagination to appreciate the burden of costs which has been accumulated, the assignment of which depends on the outcome of this appeal.

I state these facts at the outset because they represent the apparent defeat of the policy adopted by parliament when it enacted the Commercial Arbitration (Amendment) Act 1990 (NSW) (the Act). As will be explained, that Act amended s 38 of the Commercial Arbitration Act 1984 (NSW) to confine most narrowly the cases in which appeals to the Supreme Court from an award of an arbitrator would be permitted. The policy behind the amendment, as explained in *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 at 221ff (*Promenade*), was to promote the finality of arbitral awards even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law, that is the precise assignment of the parties' legal rights after a detailed scrutiny of the relevant facts and application of the relevant law.

The facts stated at the outset pose the question: have these proceedings miscarried? Ought the parties, by the application of the Act, to have been held to the award of the arbitrators? Did Rolfe J's discretion miscarry in granting leave to the proprietor to challenge the award? By doing so, did his Honour's order frustrate the intended operation of the Act and misapply the approach to the discretion established by this court in *Promenade*? If this court, now, is of the opinion that it did, ought it to hold back from giving effect to that opinion out of respect for Rolfe J's discretion? Or is sufficient ground shown to warrant disturbance of the grant of leave and restoration of the award?

This was what the builder urged. It was his submission that the approach adopted by his Honour at the threshold

evidenced a mistaken approach to the application of the Act. That mistake attracted leave to appeal to this court, despite the uncongenial prospect then opened up of the argument which ensued, and took the court into the detailed facts of the disputes between the parties.

A building dispute: three outstanding issues

Dr Keith Walker (the proprietor) owns and lives in a property at Bellevue Hill, near Sydney Harbour. On 12 March 1989 he entered into a building contract with Mr Sam Natoli (the builder). After argument was concluded in the appeal, the

court was informed that Mr Natoli had died on 4 April 1994. It will be necessary to amend the record. But no party suggested that Mr Natoli's death prevented the resolution of the protracted dispute between the parties.

The agreement for the carrying out of building works, alterations and additions to the proprietor's home was found by the arbitrators to be comprised in a number of documents, namely:

- a 3 paged signed agreement headed "Lump Sum Agreement";
- a blank standard form E5b lump sum contract;
- two architectural drawings prepared by the proprietor's architect;
- two structural engineering drawings; and
- a specification prepared by the architect.

The arbitrators found that a further document comprising a quotation, was incorporated by reference into the foregoing documents. It will be necessary to refer to this finding.

The builder commenced the works on 20 March 1989. The original date assigned for the practical completion of the works was 12 September 1989. After disputes broke out, the proprietor, on 13 December 1990 repudiated the contract. This led to a 5 day hearing before the arbitrators in July, August and September of 1992. Their award was published in November 1992.

The award was placed before Rolfe J. It found that the proprietor was obliged to pay the builder $33,643.40 together with interest. It ordered the builder to pay the costs of 2 days preliminary conferences and one abandoned hearing day. Otherwise, the proprietor was ordered to pay the costs of the remainder of the arbitration. The arbitrator's attached their reasons to their award. They incorporated the reasons into the award.

The reasons recited the dispute between the parties, the findings as to the agreement and detailed findings as to the suggested claims and counter claim involved in the dispute. Various concessions were made and findings on specific items which it is not necessary to review for they are no longer in controversy. However, three items gave rise to the application for leave to appeal from the award to the Supreme Court. They were whether, on a proper construction of the agreement between the parties, the proprietor was entitled to claim against the builder for:

(1) amounts payable to "nominated subcontractors" which the builder claimed were extras and which the proprietor claimed were included in the lump sum contract price quoted for the works;

(2) amounts later paid, for painting of the premises. The builder claimed that painting was excluded by a quotation incorporated by reference into the contractual documents. The proprietor claimed that painting was an integral part of the works which the builder had agreed to do, specifically referred to in the agreement and covered by the price agreed as the lump sum payable; and

(3) liquidated damages which the proprietor claimed for the builder's failure to bring the works to practical completion by the date for practical completion.

I pause to comment that, on the face of things, the issues stated appear, at first blush, to be nothing more than disputes about facts. Thus (1) appears to concern nothing more than whether the lump sum contract price included or excluded certain "nominated subcontractors". Similarly (2) appears to raise nothing more than the factual question whether the painting was inside or outside the contracted works. And the determination of (3), of whether or not the builder

failed to bring the works to practical completion by the date assigned, seems to involve nothing more than an examination of the peculiar facts of the conduct of this particular building operation and the builder's surrender of the house to the proprietor. Thus, a superficial view of the dispute would be that it presented nothing more than the ordinary contest between a builder and a proprietor for which arbitration was intended as an economical procedure for speedy and final resolution: avoiding the costs which are inescapable in litigation before the courts.

The proprietor, however, was able to persuade Rolfe J, on the leave application, that each of the issues involved substantially affected his rights and that there was, in each case, "a manifest error of law on the face of the award" within s 38(5) of the Act. In the final determination of the appeal, by leave, Rolfe J reversed his conclusion about issue (3) and revoked leave on that issue. But as to issues (1) and (2), his Honour confirmed his preliminary conclusions. He adjusted the obligations of the parties under the award accordingly. It is from Rolfe J's final judgment that appeal comes, by leave, to this court.

The proprietor cross-appealed against Rolfe J's final determination of issue (3). He argued that his Honour's first conclusion on the leave application was correct and that he should have found for the proprietor upon each of the three issues argued by him.

The nominated subcontractor issue

In the reasons for the award (which are incorporated in it) the arbitrators dealt, in s 6, with "nominated sub contracts". Relevantly they stated:

> 6.01 The following amounts are claimed by the Proprietor for work which was carried out by workers who were contracted directly to the Proprietor. The figures claimed in respect of the work were not challenged by the Builder.

6.01.01 Item	Amount
Security	$6,742
Marble floors, walls + installation	$9,372
Shower screen	$299.44
Built in wardrobes	$776.50
Vanities	$4,289
Garage doors	$3,160
Metal gates	$4,588
Laundry cupboards	$1,200
	_____
	$30,426.94

A further amount of $1,050 is claimed based on an estimate of the cost of shower screens yet to be fitted. The total of this aspect of the cross-claim is therefore $31,476.94.

The arbitrators then pointed at 39 of the contract specification which was exhibited before them. As they point out this reads:

> 15. SCHEDULE OF MONETARY SUMS AND PRIME COST ALLOWANCES.
>
> All items shall be provided by owner, except where stated, Builder to allow for all handling, storage and installation. Builder shall replace all items that are damaged on site.

217 ALR 201 at 205

There then follow, from the schedule of monetary sums and prime cost allowances, a number of items. Some of them appear to coincide with those claimed by the proprietor. Relevantly, they read:

...	Supply By	Installation
Communication and security	Nom Subcon	Nom Subcon
Ceramic floor and wall tiles	Owner	Builder
Marble floor and wall tiles	Nom Subcon	Nom Subcon Shower Screens
	Nom Subcon	Nom Subcon
All built ins	Nom Subcon	Nom Subcon
Vanities	Nom Subcon	Nom Subcon
Toilet Suites	Owner	Builder
Taps, bathroom fittings	Owner	Builder
Garage Doors	Nom Subcon	Nom Subcon
Metal Gates	Nom Subcon	Nom Subcon.

The arbitrators then found:

> 6.03 There are no monetary sums or prime cost allowances schedule on this page, elsewhere in the specification or anywhere in the contract documents.

From this finding of fact, the arbitrators proceeded to set out, in brief form, the respective arguments of the parties. They proceed to their conclusion on this aspect, reflected in their award:

> 6.04 The Proprietor claims that the Builder was obliged to supervise and pay all nominated sub contractors and, in breach of this obligation the Builder failed to pay nominated sub contractors in respect of work listed in 6.01.01 above. The Proprietor argues that he is therefore entitled to recover from the Builder the sum of $30,426.94 which he has paid directly to contractors for this work and a further amount of $1,050.00 which he will have to spend on shower screens yet to be fitted.
>
> 6.05 The Builder claims that the Contract Sum did not include any amount(s) for nominated sub contracts, the Builder was not authorised to supervise or sub contract any of the work listed above and was not paid any premiums in respect of this work.
>
> 6.06 CL 15 of the E5b standard form contract (Ex C2) listed in the contract documents above at 2.01.02 is headed Nominated Sub Contractors and describes the obligations of the Builder in relation to those sub contractors. CL 18 is headed Prime Cost. Provisional. or Other Such Sums and describes the mechanisms for the adjustment of the Contract Sum where money is spent by the Builder in favour of a Nominated Sub Contractor.

The arbitrators set out cl 15 of the standard form contract which related to nominated subcontractors:

> 15. The provisions of this clause shall apply where any sum of the nature referred to in CL 18 of these Conditions is included in the Contract Sum for persons to be nominated by the Architect to supply and fix materials or goods or to execute work or to fabricate or manufacture and supply materials or goods particular to and exclusively for the Works.

217 ALR 201 at 206

The arbitrators found that there were no sum of the nature referred to in cl 18. They recorded that the proprietor's argument that sums of this kind "must have been included because they were not specifically excluded". The proprietor relies upon the clause in the contract. It provided in general terms:

> THE CONTRACT PRICE ... to be paid for work shown on drawings with details to be supplied as required but exclusive of PC sums as provided on quotation.

In an abbreviated form, this encapsulated the proprietor's assertion. For him, the schedule was merely an indication of who was to supply the itemised fittings. It did not impose upon the owner, that is the proprietor, the obligation to pay for the fittings. It merely permitted the owner to nominate subcontractors where, otherwise, this privilege would have rested exclusively with the builder. Thus, the clause was about the provision of the item, not the payment for its cost. There was no contest that the architect did not actually nominate persons to supply and fix materials or goods. Therefore, there was no question that cl 15, as such, applied in its terms. Thus, the basic question which the arbitrators had to determine was whether the contract price included the items (such that the builder had to absorb their [reasonable] cost) or that the proper construction of the agreement was that the purpose of the schedule was to indicate those items which the parties had agreed would be provided by someone other than the builder, that is either the owner himself (the proprietor) or a subcontractor still to be nominated.

There are, of course, competing arguments to justify each of the constructions of the agreement urged by the parties. If there had not been, there would probably not have been an arbitration. For the builder, the proper construction of cl 15 (above) was that it contained the list of items to be provided by the owner at cost to the owner. This was borne out by the exceptional nature of the specification and the limited role of the builder. That role was limited to:

(1) allowing for all handling, storing and installation;
(2) accepting liability to replace all items damaged on site; and
(3) in the case of a number of the items, installing them, presumably at cost to himself.

The arbitrators found that there were no sums nominated by the architect, the builder or the proprietor so that nothing was to be "included (or excluded) in the Contract Sum in respect of work to be performed by subcontractors nominated by the Architect". This finding is not now in dispute. Nor is it contested that the architect had never nominated subcontractors to the builder in accordance with cl 15, above.

The arbitrators then proceeded to their conclusion:

> ... On the contrary there is undisputed evidence, with the exception of a built in cupboard, that the Proprietor entered separate agreements with head contractors in respect of this work and as a result, the provision of CL 15 and CL 18 of the E5b contract were never invoked. We therefore find that the Builder was not in breach of his obligation to pay Nominated Sub Contractors as this obligation was never called upon and we find that with the exception of payments awarded ... for work performed by the Builder in relation to a built in the Contract Sum remains unadjusted in respect of the works listed in 6.01.01 above and the claim for recovery of $31,476.94 fails.

Both on the leave application and on the appeal, Rolfe J found for the proprietor on this point. In the leave application, he analysed the foregoing reasoning. He stated that it was "common ground that the work to be performed by the nominated contractors was work shown on drawings". He held that the

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contractual obligation of the builder was to carry out the work (including that contained in the drawings) for the agreed lump sum price. The only exception which his Honour would allow from the agreed sum was for PC sums expressly excluded, as provided on quotation. Because none were so excluded, he regarded the conclusion as "inevitable" that the sums were included in the lump sum contract price:

> There was a clear obligation on the defendant, in my view, to exclude any such sums in the manner provided for by the agreement, if he wished to avail himself of the contract provision.

Rolfe J specified "two errors on the face of the award":

> Firstly, the arbitrators had regard to a document which did not constitute a contractual document as found by them. Secondly, in having regard to that document, the arbitrators misconstrued it or caused it to work a variation to the contract which was not

permissible.

It will be necessary to return to the quotation in respect of the dispute concerning painting. However, with respect to Rolfe J, I do not read the arbitrators as relying upon the quotation in upholding the builder's contention in respect of the subcontractors. The arbitrators accepted that, nothing appeared in the quotation which specified PC sums which were to be excluded. It was common ground that there no such sums were nominated, either in the contract or otherwise. In his Honour's view, the error of the arbitrators, on the face of their reasons, was to be found in the passage which stated their findings:

> We find that there were no sums nominated by the Architect, the Builder or the Proprietor in the tender/contract documents and that an amount of nil IS THEREFORE INCLUDED (or excluded) in the Contract Sum in respect of work to be performed by sub contractors nominated by the Architect. [Emphasis added]

The arbitrators simply appear to have assumed that the items were excluded unless the architect had nominated the subcontractors. But this constituted a failure on their part to decide whether, within the general language of the agreement between the proprietor and the builder, the obligation to pay for the specified item was clearly one for the builder.

To demonstrate that this was so, counsel for the proprietor took us most painstakingly through the lump sum contract, the drawings and the specification. His argument progressed thus:

(1) The lump sum contract carried, on its face, the contract price agreed, viz $175,175.
(2) That price was identified as being "for work shown on drawings with details to be supplied as required, but exclusive of PC sums as provided on quotation".
(3) As to PC sums (other than perhaps painting) they were identified on quotation (a matter to which I will return). Prima facie, therefore, all sums necessary to perform the work shown on the drawings would have to be borne by the builder.
(4) This approach to the contract document would conform to the nature of the contract in the standard form document as a "lump sum contract" and to the very premises in respect of which the work was being performed, viz an integrated domestic residence.
(5) While there were addenda to the contract identifying special conditions in relation to demolition and plastering, there were no similar addenda

varying the agreement between the parties in respect of the disputed items listed in para 6.01 of the reasons supporting the award.
(6) In the standard form "agreement and conditions" it is recited that the parties had agreed:

> For the consideration hereinafter mentioned the Builder will upon and subject to the Conditions attached hereto execute and complete the WHOLE OF THE WORKS shown upon the Contract Drawings and/or described by or referred to in the said Specifications and each of the provisions of this contract shall be read and construed as subject to this PRIMARY RESPONSIBILITY. [Emphasis added]

(7) Among the conditions, the very first was one by which the builder promised to:

> 1
> (a) ... carry out and complete the Works in accordance with this Contract ... respecting:
> (i) the Works as shown and/or described in the contract documents INCLUDING THE WORK OF NOMINATED SUB CONTRACTORS AND NOMINATED SUPPLIERS. [Emphasis added]

This provision thus imposed upon the builder the obligation to do the works of nominated subcontractors, suggesting (so it was argued) that such works were part of the contracted work for which the builder was paid. The builder's private arrangement with nominated subcontractors could not, therefore, form an excuse (save as expressly provided or specifically agreed) to exempt him from his primary obligation.

(8) By condition 2(b) the conditions are to prevail in the event of contradictions, discrepancies in the contract drawings or specifications. By condition 2(c) the builder is obliged, if he finds any errors, omissions or discrepancies immediately to give a written notice to the architect so that the latter can issue specification instruction. No such application was ever made.

(9) The drawings were examined. They are most detailed. But they appear to identify all, or nearly all, the items in the disputed list. Most importantly, the gates, door and security arrangements are shown in considerable detail. The other items can either be seen or inferred. None of the drawings contradict the inclusion in the works of the various items specified. Indeed, there was no dispute that they were necessary and indeed performed. The dispute was only about the obligation to absorb their cost.

(10) In the preliminary provisions of the specification prepared by the architect there is a statement, in para 1.1, on the intent of the documents. It is there stated that:

> Where an item is usual or necessary or is reasonably or properly to be inferred, but is not specifically mentioned in the contract documents, it shall be deemed to be included.

(11) In para 1.2 it is expressly stated:

> Variation to the contract sum or date of completion shall be authorised only in a Variation Order issued by the Architect in which the amount of the variation shall be stated.

It is common ground that no such variation was approved.

(12) By condition 2.1.b of the specification it is provided that the special conditions were to prevail over the

conditions of contract in the event of conflict or variance.

(13) In para 2.2 of the specification it is provided:

> a. The Builder is to provide everything necessary for the proper execution of the work to the true intent and meaning of the plans and specifications taken together. Anything shown on the plans and not specified, or vice versa, is to be taken as included in the Contract and any minor item although not mentioned or shown but obviously intended or necessary for the class of works generalised in the Specification are to be executed by the Builder and are included in the Contract.

(14) The specification contains specific mention of at least some of the disputed items such as floor tiling, marble wall and floor tiles (cl 12.4) which are to be supplied "by nominated subcontractor". There then follows cl 15 with its "Schedule of monetary sums and prime cost allowances": see above.

It was upon the basis of the foregoing that the proprietor argued before this court that the arbitrators had demonstrated a "manifest error of law on the face of the award". They had assumed that if an item was not excluded (as nominated by the architect) that item was therefore to be included as nil. A proper construction of the documents identified by the arbitrators as being those which constituted the agreement between the parties led inevitably to the conclusion that the items mentioned were part and parcel of the contract works, as shown in the drawings and mentioned in the specification. So analysed, the arbitrators had incorrectly construed the contract. To the extent that the arbitrators appear to have relied upon the action of the proprietor in entering separate agreements with head contractors to complete the work which the builder failed to do, they had failed to conform to the instruction of the High Court in *Adelaide City Corporation v Jennings Industries Ltd* (1985) 156 CLR 274 at 283 ; 57 ALR 455 at 461-2 .

The painting issue

The specification undoubtedly required the builder to perform extensive painting work. He was also obliged to make good damage to the building, including painting work, which occurred during the course of the work. The builder performed no painting. The proprietor claimed against him the sum of $20,599 being the cost of painting.

In defence of his argument that the contract price excluded painting, the builder tendered a written quotation. That quotation (which was dated 12 February 1989) read:

> Dear Sir,
>
> We thank you for the opportunity to tender for the proposed alteration and addition work to residence ...
>
> The quotation has been worked out to Simon Wackerman [architect]. Specification and architectural plans A 8879, A 8880.
>
> Item not quoted for are:
>
> * Painting
>
> TOTAL COST FOR LABOUR AND MATERIAL $175,175.00
>
> Many thanks
>
> S NATOLI

Managing Director

The letter contains no addressee but clearly enough it is addressed to the proprietor.

The arbitrators found that the builder's written quotation (which they admitted over the objection of the proprietor) "was incorporated into the 3 page signed agreement by reference".

The arbitrators dealt with this item briefly:

> We construe the conflicting requirements in the contract documents giving precedence to the most recently prepared document, the three page signed agreement incorporating the Builder's quotation to exclude painting over the contract specification which includes painting. We find therefore that the Builder was not required to paint and that no painting was included in the Contract Works.

The "three page signed agreement" referred to bears date of 12 March 1989. It contains the contract price. It will be recalled that it also bears the statement that the amount was for:

> Work shown on drawings and details to be supplied as required but exclusive of PC sums as provided on quotation.

The 3 page document was signed by each of the parties.

Rolfe J, in his reasons for giving leave, relied on what he saw as the "completely inconsistent ..." finding of the arbitrators, earlier in their reasons, that the contract between the parties was "entirely written and consisted of the documents listed, viz the 3 page agreement; the blank standard form E5b lump sum contract; the two architectural drawings; two structural engineering drawings; and a specification.

Rolfe J determined that painting was clearly within the contract. It was referred to in the specification. In the nature of the work, painting would be inherently necessary. The builder was merely seeking to add, by way of his written quotation, what was effectively an ex post variation of the 3 page document. It was not part of the written agreement. Its tender was objected to at the hearing. The finding that it was "incorporated by reference into the agreement" was unconvincing. The parties should be held to the written agreement which they had agreed.

In his decision on the appeal, Rolfe J confirmed this opinion. He concluded, in effect, that this was an attempt at unilateral variation of the contract by the builder. It did not conform to the written documents which the arbitrators themselves had found to constitute the agreement between the parties. Not having been agreed, the quotations did not bind the proprietor who was entitled to rely upon the contract as found.

In this court, the builder argued strongly that the finding of what constituted the contract, or what was incorporated in the contract, was a question of fact for the arbitrators. So long as there was some evidence upon which they could

reach their conclusion, it was not to the point that Rolfe J disagreed with that conclusion.

There is no doubt that the 3 page document, found by the arbitrators to be part of the agreement, was a central element in defining the builder's obligations. That document referred to a "quotation". It was open to the arbitrators to find that the "quotation" referred to was the one afforded a month before the 3 page document was executed by the parties. It was not disputed that that quotation had been received. That quotation expressly contains an exclusion and one only, viz: "Items not quoted for are: * Painting".

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On this evidence, the issue was purely one of fact. There was no error of law at all. Still less was there a "manifest error of law". It was in the province of the arbitrators to decide which documents made up the agreement between the parties. If they determined that one document by reference incorporated another, such determination was purely factual. As such, it was unassailable. Far from being manifestly erroneous, the arbitrators' award and reasons appear sensible. They represented, upon this point, the practical conclusion for which arbitrators (comprising a builder and an architect) were more likely to reach the proper conclusion than lawyers.

The liquidated damages issue

The claim for liquidated damages is contained in the proprietor's cross appeal. The builder was liable to pay liquidated damages in the event of non completion of the works by the required date: see cl 27 of the standard form contract and cl 1.13 of the specification.

Clause 25(s) of the standard form contract contained the following relevant provision: "25(f) In the absence of written agreement between the Proprietor and the Builder, if the Proprietor occupies and/or uses the Works prior to the issue by the Architect of the Notice of Practical Completion pursuant to this clause, the Works shall be deemed to have been practically completed on the date of commencement of such occupancy and/or use."

The arbitrators found that the contract required the work to be completed within 26 weeks from the date of signing. The 3 page agreement was signed on 12 March 1989. Thus, the contract date for practical completion was 12 September 1989. No applications for extension of time were made or granted by the architect. No certificate of practical completion was ever issued. The builder's defence was that the claim for liquidated damages was "extinguished" by cl 25(f), above. The proprietor disputed that defence. He contended that it has always been a term of the contract that the proprietor's family would be in occupation during the works. So much was acknowledged in cl 1.6 of the specification which provided: "The builder shall execute the works so as to interfere as little as possible with the occupants and shall provide all protection required for preventing dust, accidental breakage to items etc."

A dispute arose in the arbitration as to when that part of the house, which contained the contract works, became habitable. The arbitrators found:

> 9.06 We accept the distinction made by the Builder and find that occupation of the Works for the purposes of deemed practical completion relates only to those sections of the house for which the Builder had responsibility. Accordingly we find that there was no written agreement between the Proprietor and the Builder for occupation or use of the works.
>
> 9.07 The builder gave evidence ... that Mrs Walker, the Proprietor's wife and her family took over the ground floor laundry and bathroom around the sixteenth week of the contract period and that the family used that area and the family room from that time on. Mr Natoli concedes the bathroom was not complete at that time since trades directly contracted to the Proprietor had not completed their work. The Proprietor, in his written statement denied that his wife and family occupied this section of the house at this stage. Mrs Walker and her family, although they attended the hearing did not give evidence. We prefer the evidence of the Builder on this issue and we find that the Works were occupied on or around 18.7.89 and before the contract date for Practical

> Completion and that by virtue of early occupation the Proprietors right to claim liquidated damages is extinguished.

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In the leave proceedings, Rolfe J found that this conclusion also warranted leave. He suggested that the arbitrators' error had arisen from a misunderstanding of cl 1.6 of the specification. It had been open to them to award liquidated damages. He found this to be "clearly an error on the face of the award". But in the appeal itself, he changed his mind on this point, concluding:

> ... I have decided that it was open to the arbitrators, although I think it was hardly contemplated by the parties when the contract was entered into, to make the finding appearing in 9.0.6 ... In addition to that finding of fact the arbitrators found that portion of the work had been occupied, which was not in dispute, although even if it had been in dispute the fact finding process was one for the arbitrators. In the result I have come to the conclusion that ... this matter was to be determined and was determined by the arbitrators as a matter of fact and, accordingly, it does not give rise to any manifest error of law on the face of the award. Part of the problem stemmed from the failure of the parties to accommodate the contract fully to the particular factual situation.

His Honour revoked leave on that point. Hence the proprietor's cross-appeal once leave was granted to the builder to appeal against his Honour's other determinations.

The proprietor argued that the arbitrators had failed to determine the sections of the house for which the builder was responsible. He argued that a distinction should have been made between habitable areas and the area of the works. The failure to make that distinction constituted a misreading of the agreement. It was thus an error of law as his Honour had originally thought. With some force, the proprietor pointed to the important protection which the right of liquidated damages affords to a person in his position against delay and incompetence on the part of a builder. Even in a case such as the present, where the proprietor and his family were to remain in occupation of part of the premises, it could scarcely have been in their contemplation that they would surrender completely the protection of liquidated damages, merely because, as cl 25(f) envisaged, the proprietor occupied the works, or part of them, before the issue of a notice of practical completion.

The builder supported the award and Rolfe J's final assessment of it. He contended that, upon the findings of fact contained in para 9.07, it was open to the arbitrators to find as they did in para 9.06. It was open to the arbitrators to decide, as Rolfe J had found, that the written contract had not expressly covered the particular, and somewhat unusual, arrangement between the parties. To the extent that it had, in para 25(f), the findings of fact concluded the matter. It could not be a manifest error of law on the face of the award.

"Manifest error" -- a stringent requirement

I have now indicated, at some little length, the competing arguments before this court. As leave was granted by the court -- primarily to test the approach adopted by Rolfe J against that mandated in *Promenade* -- this course has been necessary, however uncongenial it may have been. I say that it is uncongenial with no disrespect to the parties. They are before a court. They are entitled to have their dispute determined according to law. But the formula which the law provides to govern the resolution of the dispute presents an important limitation. It is one which has been deliberately enacted by the parliament of this state. Indeed, it is part of uniform commercial arbitration legislation enforced in other jurisdictions of this country. The limitation was imposed because it was considered that:

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(1) The approach previously adopted by the courts, including in this state, was unduly disturbing of the use and finality of arbitral awards.

(2) The leading authority of this court in a judgment of McHugh JA in *Qantas Airways Ltd v Joseland and Gilling* (1986) 6 NSWLR 327 at 333 was too tender to the achievement of justice and insufficiently attentive to the needs of finality in this class of litigation.

(3) Other decisions in the court, and the inclination of the judges (including myself) to review arbitral awards and to re examine facts had to be brought to a halt. My own inclination in this area can be found in my dissenting opinion in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 ; 9 ALN N245 and in my minority opinion in *Wardley Pty Ltd v Adco Constructions Pty Ltd* (1988) 8 BCL 301 at 305f .

(4) The clear preference of parliaments throughout Australia has been for the more robust and narrow approach favored by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 ; [1981] 2 All ER 1030 .

(5) That this is so can be seen simply by tracing the amendments to the Commercial Arbitration Act s 38 and contrasting the provisions as they stood in the Act of 1984 with those which now obtain. The Act now requires, relevantly, that there is "a manifest error of law on the face of the award". In case of doubt, it is permissible to read what the Attorney General said to parliament in introducing the Commercial Arbitration (Amendment) Bill 1990 (NSW).

The government was concerned that, all too often, arbitration had become simply a "dry run" for the litigation which followed. The opposition spokesman (Mr Whelan) also emphasised the need for speed in the alternative dispute resolution which arbitration provides. Because of the delays in the court system, and the capacity of litigation in the courts to occasion frustration and expense, many commercial people have been unable to have their matters resolved in a timely way: see New South Wales, *Parliamentary Debates* (Legislative Assembly), 29 November 1990, 11569.

(6) Effect was given to the statutory amendment by the decision of this court in *Promenade*. There, Sheller JA explained the amendment, its purposes and its requirements. His Honour's judgment enjoyed the general agreement of Mahoney JA and the concurrence of Meagher JA.

(7) *Promenade* has been followed by other courts in Australia. By that it has contributed to the policy reflected in the legislation of other jurisdictions which have adopted the same statutory standard: see, for example *Commonwealth v Rian Financial Services and Developments Pty Ltd* (1992) 36 FCR 101 .

(8) A review of the decisions of single judges in the Supreme Court since *Promenade* also appears to bear out the contention that its principles are being accurately observed. This court, in its turn, is conforming to the requirement. See *CR and R Lieschke v BR Turner* (unreported, CA(NSW), Full Court, No 40079/92, 9 March 1992) (refusing leave to appeal from Giles J).

(9) In only one case, so far as I am aware, has this court provided leave to appeal where it was refused by a judge at first instance. This is *Friend and Brooker Pty Ltd v Council of the Shire of Eurobodalla* (unreported, CA(NSW), Full Court, No 40293/93, 24 November 1993) . In that case

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an appeal, from a refusal by Cole J, was allowed because there appeared to the court to be a clear and simple oversight by the arbitrator of the principle of law that if a breach of contract has two causes, both cooperating and of equal efficacy in causing the loss, a party responsible for the breach is liable to the plaintiff. The case involved concentration upon a few words on the face of the award. It involved nothing like the examination of the contractual documents, the disputed facts and the contested arguments that has been such a feature of this case, both at first instance and in this court.

So convincing is the exposition of Sheller JA in *Promenade* of the meaning and purpose of the amended legislation, and of the duty of judges to conform to it, that little point is served by detailed re-examination of the matter. But a

glance at authority in the United States of America confirms, in analogous contexts, the approach which Sheller JA expounded. For a long time, in that country, federal and state statutes have limited certain appellate and other curial interventions, to cases of "manifest error". No doubt the reasons include some of those which are now forcing Australian legislatures to adopt a similar approach. The large number of law suits, the pressure on the courts, the potential for delay and, thereby, of injustice and the need to look at dispute resolution in a more robust and less exquisite way has led lawmakers in the United States, and the courts, to lay down "manifest error" tests.

The constitutionality of those tests was challenged as conflicting with the requirements of due process provided by the United States Constitution. But in *Kimberly v Arms* 129 US 512 (1889) it was held that they did not offend the Constitution. Therefore, for more than a century, "manifest error" tests have been operating in the United States. The judges have generally declined to define what the test precisely means. Typically, they have adopted criteria which refers to whether there was "evident error, obvious, capable of being easily understood or recognised at once by the mind": see Pettine CJ in *DeCosta v Columbia Broadcasting System, Inc et al*, 383 Fsupp 326 (1974) (USDC) 339 . When the judge finds no such manifest error, he or she is duty bound to avoid entering into the detail of the case. What is in issue is a preliminary impression. It should not require a great deal of argument. The precondition to curial intervention is the easy demonstration that the primary decision maker was "clearly wrong": *Bell v Bell* 417 So 2d 115 (1982) (La CA) ; *Flamm v Flamm* 442 So 2d 1271 (1983) at 1273 (La CA) .

United States authority on "manifest error"

Necessarily, the criterion has been held in the United States to require great deference to be given to the primary decision maker's findings of fact: see *Beaudoin v Hartford Accident and Indemnity Company et al* 594 So 2d 1049 (1992) (La CA) . If there are two permissible views of the evidence, the fact finders choice between them cannot be "manifestly erroneous" or "clearly wrong": see for example *Fredericks v Warren* (561) So 2d 209 (1990) (La CA). This is so even if the appellate court feels that the evaluations and inferences which it would draw are different from those which the primary decision maker has drawn. The existence of two possible views contradicts "manifest error": see *Smith v Two "R" Drilling Co Inc* 606 So 2d 804 (1992) (La CA) 808 : see also *Rosell v Esco d/b/a Jolly Elevator Corp, et al* 549 So 2d 840 (1989) (La SC) . If the only way an error can be shown is by requiring of a court the most elaborate examination of the facts and of the law, this is not a case for which "manifest

error" can been made out. The object of so providing in a statute is precisely to prevent a court from embarking upon such a detailed scrutiny. Hence the adjective "manifest". *Porotto v Fiduciary Trust Co* 75 NE 2d 17 (1947) (Mass SC) at 20 . To the extent that the court does embark upon such an elaborate examination of fact of law, it defeats the achievement of the object of the rule requiring the demonstration of "manifest error".

None of these authorities takes the principle in *Promenade* beyond what was stated by Sheller JA. But they demonstrate that the criterion adopted by our Commercial Arbitration Act is not unique. The problem which it presents is shared by judges in many jurisdictions of the United States. It is clear from reading their authorities that they have accepted the requirement of very considerable judicial restraint where the criterion of "manifest error" obtains. We must do likewise.

This is not to say that the criterion slams the door on judicial intervention or deprives judges, whose jurisdiction is invoked, of the necessity to exercise the discretion thereby conferred upon them. At first instance, as in this court, particular questions of law, deemed apt for judicial scrutiny, have been isolated and considered upon one or other of the criteria stated in s 38 of the Act: see for example *Wilkinson v Creer*, Supreme Court (Cole J), reported, 3 July 1991. Nor is it to say that advocacy has no place. Parties may be legally represented. Persuasion is the art of the advocate. The new criterion must not be debased into a rejection of logical argument. The judicial mind ever be open to persuasion: that manifest error exists.

Obviously, there is a difficulty in the word "manifest". What may be "manifest" to one judicial officer may fail to

persuade another. The criterion cannot be the swiftness of mind of the sharpest intellect. Nor can it be the perception of one whose whole career has been devoted to examining and reflecting upon building contracts. An objective, not a subjective, test for what is "manifest" is contemplated. But the word will not go away. Against the background of its history in this context it requires swift and easy persuasion and rapid recognition of the suggested error. Otherwise, parliament has taken the decision that it is better for the community as a whole that the parties should be held to their arbitral award. The price of lengthy exploration and reconsideration may prove warranted in a particular case. But, in the administration of justice as a whole, it is not. Expressed in economic terms, the marginal utility of the variations which will be achieved in particular cases is outweighed by the marginal cost of the delays, frustrations, uncertainties, inconvenience and legal and other expenses thereby necessitated.

This will seem a harsh decision to those who can show error in an arbitrator's award. It will seem particularly harsh where an error of law can be shown. It may even seem intolerable where an arguable, but not "manifest", error of law is demonstrated. But that is the choice which parliament has deliberately taken. Judges must be faithful to that choice. They must obey it, even where their inclinations suggest that a detailed and painstaking review of the facts and the law might ultimately persuade them that the arbitrator has erred.

Application of the test of "manifest error" to this case

I now turn back to apply the test so explained to this case. In my view, with respect to Rolfe J, he erred in granting leave on any of the three points argued. He erred in re-determining the first two points and was right in restoring the arbitrator's award in respect of the third.

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It is difficult to reconcile the deference to the arbitrator's province of fact finding, acknowledged ultimately in the resolution of the third point, with the approach taken by his Honour on the first and second.

So far as the nominated subcontractors are concerned, I accept at once that the case for the proprietor is arguable. To some extent the matter went off on a tangent by reason of the consideration of whether the items claimed were within the exclusion contemplated by cl 18 of the lump sum contract. It was ultimately common ground that there were no such sums and the arbitrators so decided. The way in which they expressed their reasons for their award in connection with this item is not entirely clear. But I take the arbitrators to have determined that where, in para 15 of the specification, it was stated that the item in dispute "shall be provided by owner", that meant, in the context, that the owner would pay for them. That was certainly a construction open to the arbitrators. Determining the contract in this way was far from manifest error. The arbitrators were obliged to give primacy to the particular provisions of the specification over the general provision of the printed document. "Supply by" is apt to mean supply at cost to. At the least, this was a construction which the arbitrators could lawfully adopt. If they did so, the general price agreed for the lump sum contract would not include the items which the proprietor had himself to supply. There is no point of law in such a determination. Still less is there a manifest error of law on the face of the award.

The claim in respect of the painting is even more clear in my view. lt is true, as Rolfe J insisted, the written contract included the five documents, notably the 3 page signed "addendum". But it was certainly open to the arbitrators, as fact finders, to decide that, where in this addendum it was stated that the lump sum was "exclusive of PC sums as provided on quotation", this incorporated by reference the quotation which the builder had supplied to the proprietor in advance of the execution of the addendum. This coincides with the specification in the quotation of the precise sum thereafter stated in the addendum, viz $175,175. To that extent, the arbitrators demonstrated no inconsistency about the written parts of the agreement which they had enumerated. But the "quotation" was necessary because it was specifically referred to in the 3 page addendum. I see no error in the arbitrators' determination of this point. They have determined it precisely as I would the same facts. This last conclusion is not, strictly, relevant. But it shows that there was no error. Still less was there an error of law on the face of the award which was manifest.

In my view Rolfe J was right in affirming the arbitrators' determination of the claim for liquidated damages. Basically, I agree with his conclusion. The result is somewhat odd. But the arrangement between the parties was itself unusual. They contemplated precisely what occurred. But they did not expressly provide in their written documents for the situation which arose in the facts found by the arbitrators. The view which the arbitrators took of the agreement was open to them. Again, there was no manifest error of law on the face of the record.

Conclusion: no manifest error

In the result, it is my view that the proper application of the *Promenade* principle required the rejection of the application for leave to appeal from the arbitral award. The course of this litigation, with its relatively modest stake and its high burden on cost and delay (it outlasted the builder's life) demonstrates the precise mischief to which the amendment of the Commercial Arbitration Act was addressed.

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Judges, whose lives are devoted to the painstaking examination of facts and the scrupulous application of the law, necessarily react with hesitation at the very thought that, by refusing leave, they may be countenancing a legal injustice. I understand that reaction. But the lesson of this case is that judges must steel themselves to that thought. Parliament has decided that, viewed as a whole, it will ordinarily be best to hold parties to their arbitral awards. The interventions of the courts must be strictly limited. When they are, parties will be spared the fourfold litigation that has occurred in this case. They will be spared the delays, the uncertainties and the costs of further litigation. The signal must be sent quite clearly. Otherwise litigants, like Dr Walker, will be burdened, as he must be now, with extremely onerous cost obligations. Those costs constitute an important reason behind the legislation which *Promenade*, and now this decision, are designed to uphold. Only if *Promenade* is faithfully followed will be the public be spared the delay in the resolution of other cases which must be heard by the courts, and the expenditure of public costs necessarily incurred in curial consideration of disputes of this kind.

Orders

I favour the following orders:

(1) Grant liberty to the appellant to amend the record to substitute for the appellant the name of his legal personal representative.
(2) Allow the appeal.
(3) Dismiss the cross-appeal.
(4) Set aside the orders of Rolfe J.
(5) In lieu of those orders order that the summons whereby Dr Keith Walker sought an order granting leave to appeal against the award of arbitrators Thomas and Grey herein be dismissed with costs.
(6) Order that the costs of the proceedings at first instance be paid by Dr Walker.
(7) Order that the costs of the cross-appeal be paid by Dr Walker.
(8) Order that the costs of the appeal be paid by Dr Walker (including the costs of the summons for leave to appeal to the Court of Appeal) but that, in respect of such costs, Dr Walker have a certificate, if otherwise so qualified, under the Suitors' Fund Act 1951 (NSW).

Mahoney JA.

On 9 November 1992 two arbitrators awarded the proprietor, Dr Keith Walker, $33,643.40 and other ancillary

relief. He applied to the Supreme Court for leave to appeal against that award: that leave was granted on 19 February 1993. On 9 July 1993, after a hearing on the merits, judgment was given for Dr Walker for $25,696.98. On 5 April 1994, the builder Mr Natoli, appealed to this court upon the ground, inter alia, that leave to appeal should not have been given.

In my opinion, leave to appeal against the award should not have been given. On that ground, I would uphold the present appeal, set aside the judgment, and dismiss the appeal to the Supreme Court and to this court with costs.

The Commercial Arbitration Act 1984 (NSW) Pt 5 provides a plain indication that leave to appeal against an award should not readily be given. However, there is an understandable judicial propensity to correct what is seen as an error of law. No doubt the judge who gave leave to appeal felt it appropriate to correct what was urged to be an error and so an injustice. But in some cases the correction of an error of law may itself, by its processes, create further injustice. The cost and

the delay involved is often unacceptable. These considerations no doubt influenced the formulation of the principles on which the Act is based and the adoption of them by the legislature.

The present case illustrates the tension between the desire to correct error and the cost of doing so. Mr Natoli contracted to do renovations and make additions at Dr Walker's home in Bellevue Hill. The lump sum price agreed was $175,175. The contract was made up of a collection of documents, plans and specifications brought together by a short agreement. The arbitration involved two arbitrators, two preliminary conferences, an aborted hearing day, and 4 or 5 days hearing with appropriate legal representation. There were claims and cross-claims. In the end, the builder Mr Natoli recovered an award of $33,643.40, with interest and ancillary orders for costs and the like.

The cost of obtaining the award by arbitration must have been about the same as the amount awarded. The arbitration itself, excluding legal costs, cost $17,450, in addition to the ordinary charges made by lawyers.

The arbitration costs were itemised in the award as follows:

MBA room hire	10.6.92	$100
	9.7.92	$100
	24.7.92	$200
Arbitrators fees for	10.6.92	$480
	9.7.92	$480
	24.7.92	$1600
MBA nomination fee		$100
MBA administration fee		$100
RAIA nomination fee		$50
MBA room hire and hearing days		$800
Arbitrators fees (not included above)		$13400
		$17450

The legal costs of such a proceeding would no doubt have been substantial. It is fair to suspect that little if anything would have been recovered. In addition to this, the legal and courts costs of an application for leave to appeal, of the

hearing before a judge and, as has occurred, of the appeal to this court have no doubt added greatly to those expenses.

My initial impression was that, if there was in truth an error of law involved in the award, the cost of correcting it would be disproportionate to the consequences of the error. That, in the event, is arguably the position. The award which Mr Natoli obtained against Dr Walker, $33,643.40, has been changed to judgment for Dr Walker for $18,432.54 plus interest ($7264.44), totalling $25,696.98.

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However, in concluding that leave to appeal against the award should not have been given and in setting aside the judge's order, I am differing from a discretionary decision of the trial judge. The question at issue is what is the appropriate exercise of the power given to allow appeals to the court under the Commercial Arbitration Act. Accordingly, I shall indicate the reasons why I have come to this conclusion.

The legislation

Section 38 of the Commercial Arbitration Act 1984 (NSW) takes from the court its traditional jurisdiction "to set aside or remit an award on the ground of error of fact or law on the face of the award". It provides in place of that jurisdiction a limited statutory appeal. An appeal lies "on any question of law arising out an award": s 38(2). But -- in a case such as the present -- such an appeal may be brought only "with the leave of the Supreme Court": s 38(4); and that leave shall not be granted unless the court considers that "the determination of the question of law concerned could substantially affect the rights of" parties to the arbitration agreement and (in a case such as the present) there is "a manifest error of law on the face of the award": s 38(5).

The terms of s 38 were considered by this court in *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 . When an application for leave to appeal to the Supreme Court is made, the court must consider two things: whether the requirements of s 38(5) have been satisfied; and (if they have) whether as a matter of discretion the leave should be given: see *Promenade Investments Pty Ltd* at NSWLR 226B.

In this case, it has been contested that a manifest error of law or, indeed, any significant error of law appears on the face of the award: *Promenade Investments Pty Ltd* at NSWLR 225-6. However, for the purposes of dealing with the argument, I shall assume that the statutory requirements of s 38(5) are satisfied. I shall consider whether, on that assumption, leave to appeal to the Supreme Court should have been granted.

There are, in my opinion, a number of reasons why it should not. The cumulative effect of these is, I think, that the decision to grant leave was wrong and that this court should set it aside.

First, in order to decide the question of law relied on, it has been necessary to examine and, perhaps, to scrutinise the accuracy of, a number of decisions of fact made by the arbitrators. If the suggested error of law requires for its determination the examination of matters of fact in this way, prima facie the case is not a proper one for leave to appeal.

An appeal lies only "on any question of law arising out of an award". In the present case, the errors alleged involved at least three matters: I shall refer to them compendiously as the sub contractor's matter, the painting matter, and the liquidation damages matter. Each of these, if it involved a question of law, involved also for the determination of it an issue or issues of fact. The result has been that, in the process of dealing with the question of law and with such orders as may be made upon the appeal: s 38(3); the trial judge was involved in detailed examination of factual matters, as to some of which there was significant dispute.

The sub contractor's matter is an example of this. The claim, as pressed before this court, was said to derive from cl 15 of the contractual terms embodied in the contract. That clause, in its terms, was said to apply "where any sum of the nature referred to in CL 18 of these conditions is included in the contract sum for persons to be nominated by the

architect to ...". The court was informed that the

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builder did not prepare details of the cost of the individual works aggregating the lump sum quotation. Therefore, it does not appear that there was any relevant sum "included in the contract sum" in that way.

However, this aspect of the claim was, I think, pressed in a different way. The contest in respect of this matter was, in substance, as to who should bear the cost burden of items set forth in the cl 15 contained in the specifications (schedule of monetary sums and prime cost allowances). The court has been informed that the builder, Mr Natoli, denied liability in respect of the relevant items and that consequently separate arrangements were made by Dr Walker for the carrying out of the works there referred to. He then claimed for the cost of the work that he had done by "subcontractors". This claim, on one view, was in reality a factual claim for breach of contract or a quantum meruit claim; whatever be the basis, it required a factual analysis of what was done and why.

Similarly, the painting matter involved the determination of whether a quotation prepared by Mr Natoli excluded painting from the work to be done or put the burden of the cost of it on Dr Walker. This depended, in substance, upon the determination of whether in the event which occurred the quotation was a relevant part of the contractual documents.

I do not, by what I have said, intend to indicate that, on an appeal "on any question of law", issues of fact may not in some cases arise for examination or that the Supreme Court should not, if it may do so within the limits laid down by s 38(3), review some questions of fact. But, as a general principle, a question of law which involves that issues of fact must be reviewed or, a fortiori, decided in order that the question of law be disposed of will prima facie be inappropriate for leave to appeal.

Second, the form of the contract in this case was unsuited to the kind of appeal envisaged by s 38.

In an ordinary contract for the doing of work, the main functional purposes of the contractual document are to define what is to be done and to specify how it is to be done. But, in the case of a building contract -- at least, a building contract of the present kind -- difficulties often arise in doing these things in the contract. In many cases, the parties are agreed upon what is to be done only in the sense of what the final result is to be: they are agreed upon, for example, what the final building is to be. But to achieve that final result, many things may have to be done and there may be many ways of doing them. Unless these are to be left completely to the discretion of the builder or the proprietor (something which seldom is acceptable), it is necessary that the contract formulate the detail of them in advance. However, in a substantial building contract, it may be difficult or impossible to do so. The parties may not be able to specify in advance precisely what work is to be done: for example, in building a dam, the final form of the work may depend upon what is discovered or what happens during the progress of the work. And, as the work progresses, it may be seen as necessary to vary what has been agreed to be done or the way in which it has been agreed to be done. Accordingly, in a building contract there are ordinarily found provisions, of the nature of contractual mechanisms, whereby the work to be done may be more clearly defined or varied from time to time and whereby directions may be given as to how the work is to be done. Thus, it may be left to an architect or an engineer to specify the detail of what is to be done or how it is to be done.

This, of course, is no new insight. But where a building contract is of this kind, what a party should in the event have done in carrying out the contract often

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depends not upon the terms set forth in the contract but upon what has been done in the exercise of the powers given or the operation of the mechanisms specified in the contractual document. It may depend, for example, upon what directions were given by the architect or engineer under the mechanisms set up by the contract and how they were carried out. The result of this is that not infrequently, in order to determine a question of law arising under the contract, it is necessary to determine what in fact was done in the course of the administration of it. Accordingly, it is necessary to examine questions of fact. For example, it may be necessary to decide whether the architect had the power to direct

the builder to do the work in question or to include or exclude the cost of it in preparing a certificate, and to do this it may be necessary to decide whether the factual basis for the exercise of that power had arisen. These matters may be important in deciding whether leave to appeal should be given.

In a contract of the present kind there is difficulty of another kind. The present contract was held by the arbitrators to consist of a short agreement, several architectural or engineering drawings or details indicating the nature of the completed work, a standard form of lump sum contract not executed but containing standard clauses, and a specification prepared for the particular work. It was claimed that the contract included also the quotation to which I have already referred: the arbitrators held that, in principle, it did not.

In a contract which defines the parties' contractual rights in this way, difficulties often arise. I do not mean by this that parties are necessarily to be criticised for making contracts in this way. Sometimes, when contractual documents are prepared by non lawyers, time and cost may be saved by simply attempting to put together plans, drawings and standard forms in this way. But experience has shown that frequently difficulty arises in first determining the relationship between different documents and then in evolving from the various documents an integrated statement of the rights and obligations of each of the parties.

The present case provides an example of this kind of difficulty. The work to be carried out, and for which a lump sum was to be paid, was described only by reference to the two plans placed before the court. It was not immediately clear what those plans required to be done or by whom. To determine these matters it was necessary to refer, inter alia, to the standard form of contractual terms and to the specifications and these, in turn, were not internally consistent. A significant part of the argument in this appeal has been directed to the reconciliation or integration of these documents and their provisions.

Questions, even if they be questions of law, which involve merely the reconciliation of disparate documents of this kind will, in my opinion, seldom warrant leave to appeal. In some cases of this kind it will no doubt be possible to isolate a "question of law arising out of an award". This can be done, for example, where issues of fact are not involved and the error is manifest or otherwise appropriate for determination under s 38. But where, as here, the isolation of the question of law involves the melding of documents and the consideration of factual issues, ordinarily the case will not be one for leave to appeal.

Third, it will ordinarily follow that leave to appeal will not be appropriate where the dispute involves, not the consideration of a bare question of law, but examination of how, against the contractual structure, the parties acted in the particular case. The present is, I think, a case of this kind. The execution of the work did not proceed strictly in accordance with the contractual terms. The

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parties, no doubt sensibly, accommodated what they did to the circumstances -- and the disputes -- which had arisen in the course of the work. But the result of that has been that the court has become involved, in principle, in determining the rights arising from their actions rather than the determination of questions of law arising from the contractual documents referred to in the award.

Finally, there is the problem of cost. In principle, a party is entitled to have his rights determined by the appropriate court and to have them determined according to law. In principle, a court may not refuse to determine issues merely because "it costs more than the issue is worth".

But there are exceptions. Parties may, for reasons of principle, pride, emotion or otherwise, become entangled in litigation the cost of which exceeds the true importance of it to them. The law and, more recently, the legislature have formulated principles and provided mechanisms whereby litigation may be brought to an end or at least regulated. The requirement that leave to proceed be obtained is an example of this.

In my opinion one of the relevant considerations to be taken into account in determining whether leave to appeal

should be granted is the relationship between the cost of the appeal and the significance of the question of law to be determined. A consideration of this kind is referred to, for example, in s 38(5)(a): the court may not grant leave to appeal unless "the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement". But that, I think, does not state exhaustively the effect of the cost factor in deciding whether leave should be given. The court may be satisfied that the determination could substantially affect such rights but yet conclude that, measuring the effect of the determination of such rights against the cost of determining them, leave should not be granted. It has long been accepted that it is in the interest, not merely of the parties, but also of the state, that litigation be brought to an end. As I have suggested, the cost of justice may be too great. To rectify error at too great a cost may produce not justice but injustice.

As I have indicated, I am conscious of the traditional right of parties to have access to courts of justice. It is important that that right be maintained; at least, it should not be inappropriately curtailed. The Act preserves the right of appeal where both parties desire that it be exercised; where they do not, leave is necessary. But, if leave be granted, one party may force another party into Supreme Court litigation and the costs of it when he would prefer to have an end to the dispute.

These considerations were, in my opinion, recognised by the legislature when it amended s 38. In *Promenade Investments Pty Ltd*, Sheller JA has referred at length to the relevant material. It is sufficient for present purposes to conclude that the cost of rectifying an error, even a manifest error, may warrant the refusal of leave to appeal.

In my opinion, considerations such as these warranted the refusal of leave to appeal in this case. I appreciate that sums of the order of $50,000 and more are not insubstantial. But these are to be measured against the costs of arbitration and the costs of court proceedings. In the present case, as the arbitrators have detailed them, the formal costs of arbitrating a moderate sized residential building dispute -- that is, the costs excluding legal costs -- have been of the order of $17,450, perhaps more. In the event, the results achieved by the arbitration and, subsequently, by the court proceedings have, in money terms, not been great. In this context, I am of opinion that the present award should not have been the subject of review on appeal.

217 ALR 201 at 223

I have to this point dealt with the grant of leave to appeal according to principle. But the grant of leave to appeal involves the exercise of a discretionary power. It is therefore necessary to determine whether, on proper principles, this court can and should set aside the exercise of that power by the judge. I shall, without deciding, assume for this purpose that the matter is to be dealt with as on the review of the exercise of a discretionary procedural power.

The learned judge, in his judgment of 19 February 1993, granted leave because, after considering in detail the questions of law proposed, he concluded that errors had occurred and that those errors were errors of law "clearly" on the face of the award. Being satisfied that they "together substantially affect the rights of the plaintiff", he granted leave.

In my opinion, his Honour failed, or failed appropriately, to give effect to the requirement that the error of law on the face of the award be "a manifest error of law": s 38(5)(b)(i). The principles are referred to in *Promenade Investments Pty Ltd* at NSWLR 225-6. The circumstances in which such a discretionary decision may be set aside are not in question. I do not think that sufficient regard was given to these principles and to their application in this case. In my respectful opinion, the factual bases on which the sub contractor's matter was approached involved error: as I have indicated, the matter appears to have been dealt with by the parties, not by the strict application of the contractual procedures, of cl 15 and otherwise, but in another way. In addition, if there was an error of law, I do not think that it was manifest. It was neither plain in the sense of being obvious nor was it manifest in the sense that there was little or no doubt that error it was. The considerations to which I have referred to not appear to have been brought to the judge's attention and do not appear to have been weighed before him. In the circumstances, the court is, in my respectful opinion, required to reconsider the matter. It is appropriate that the discretion be reviewed.

In my opinion, therefore, the appeal should be allowed. The leave to appeal should be set aside. The award should not be interfered with.

The costs of the proceedings before the judge and before this court should be paid by Dr Walker. If qualified he should have a certificate under the Suitors' Fund Act 1951 (NSW).

Meagher JA.

In this matter I have read the draft judgment of both Kirby P and Mahoney JA. I regret to say that I find myself in lonely dissent.

The facts are set out in the President's judgment. I shall not repeat them. They centre on the three matters in dispute.

As far as the first matter, the so called "extras", are concerned, the arguments are all one way, and that in favour of the proprietor, Dr Walker. The lump sum contract between the proprietor and the builder, Mr Natoli, carried on the face of it the contract price agreed, viz $175,175. That was a price which covered "the works". What were "the works"? They were the alterations to Dr Walker's house. Those alterations included the specified ten items in dispute. The documents which the arbitrators found constituted the contract make it plain that the ten items were "works" within the contract. The clause in the contract provides that the contract price covers all the "work shown on (the) drawings"; the items in question were shown on the drawings -- in at least one case, elaborately so. The contract also provides that the "work" covered by the contract is to be "exclusive of PC sums as shown on quotations", and it is beyond doubt that none of the ten disputed items fulfilled this description. It is true that in respect of either the supply or the installation of each item the proprietor had the right to nominate

either the supplier or the installer, or both. That is a common enough provision, and nobody has ever suggested it carries with it an obligation on the proprietor to pay for its supply or installation. All this has been held by Rolfe J, from whom this appeal comes. Although it is obvious enough, it escaped the perception of the arbitrators -- and for reasons they did not enunciate. It is, therefore, with some alarm that I learn my brethren intend to reverse the admirable decision of Rolfe J and reinstate the error of the arbitrators.

True it is that this is not because they approve of the reasoning of the arbitrators, because reasoning there is none, but because they are unconvinced that there is "manifest error on the face of the record", within the meaning of s 38 of the Commercial Arbitration Act. In this regard they place great reliance on the judgment of Sheller JA in *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 184 . I likewise regard that judgment as the most authoritative statement of the relevant tests to apply in this type of case. Nonetheless, I think Rolfe J was correct in his view that Dr Walker had passed that test. That there was error is obvious from my statement of facts. Was it "manifest"? In my view, it would be obvious even to a casual observer. Was it a question of law? I should have thought the construction of a document was a question of law. Was it on the "face of the record"? It can be seen from reading the arbitrator's award.

As far as the second is concerned, the facts are as follows: the arbitrators found what were the contractual documents; they stipulated for the sum of $175,175 to be paid for certain work; that work included painting; the documents in question were dated 12 March 1989; the arbitrators found, nonetheless, that the contract "incorporated by reference" a document dated 12 February 1989 to which the contractual documents do not refer, that document purporting to exclude painting from any contract. How any document can be "incorporated by reference" by another document which does not refer to it is a matter of the profoundest mystery. That did not deter the arbitrators, who found that its "incorporation" into the contract was performed orally. This compounds the mystery, as first, there was no evidence of an oral "incorporation", and second, it is inconsistent with their own finding that the contract between the parties was exclusively documentary. So Rolfe J held, and -- in my view -- correctly.

The third issue in contention is, as it were, the natural result of the above two issues. Dr Walker raises it by way of cross appeal. The builder was liable to pay liquidated damages in the event that he did not complete the required works by the due date. From that I have said it is clear that the builder did not complete the required works by the due date or at all; and he failed to do so without any excuse. Logically, the cross appeal should also be upheld.

Finally, I should wish to say something more general. It is hardly surprising that a judge of first instance should feel reluctant to grant leave to appeal from an arbitral decision of the kind in question here; it is even less surprising that an appellate court should feel an even greater reluctance. It is the duty of the court faithfully to carry out the legislature's mandate to ensure that arbitral proceedings are not employed as preliminary battles to a curial war. And, in the present case, one can only wonder why Dr Walker and Mr Natoli seem determined to exhaust so much time and energy in pursuit of such exiguous monetary sums. Yet, the future of arbitration is hardly healthy if the courts are unwilling to recognise "manifest error" when they see it, and resign themselves to permit irresponsible awards, such as the one in question, to remain uncorrected.

In my view, the following orders should be made:

(1) Appeal dismissed with costs.

217 ALR 201 at 225

(2) Allow the cross appeal.
(3) Order that the appellant Sam Natoli pay to the respondent the sum of $67,800 in addition to the $18,432.54 ordered by Rolfe J, such order to take effect as from 1 July 1993.
(4) Order the appellant cross respondent to pay the respondent cross appellant's costs of the cross appeal, but to have a certificate in relation thereto under the Suitors' Fund Act 1951 (NSW).

Orders

(1) Grant liberty to the appellant to amend the record to substitute for the appellant the name of his legal personal representative.
(2) Allow the appeal.
(3) Dismiss the cross-appeal.
(4) Set aside the orders of Rolfe J.
(5) In lieu of those orders order that the summons whereby Dr Keith Walker sought an order granting leave to appeal against the award of arbitrators Thomas and Grey herein be dismissed with costs.
(6) Order that the costs of the proceedings at first instance be paid by Dr Walker.
(7) Order that the costs of the cross-appeal be paid by Dr Walker.
(8) Order that the costs of the appeal be paid by Dr Walker (including the costs of the summons for leave to appeal to the Court of Appeal) but that, in respect of such costs, Dr Walker have a certificate, if otherwise so qualified, under the Suitors' Fund Act 1951 (NSW).

CAROLINE FALSHAW

Selected references to *Natoli v Walker* (1994) 217 ALR 201

Commonwealth v Cockatoo Dockyard Pty Ltd (1994) 11 BCL 443

Carpaolo Nominees Pty Ltd v Marrosan Nominees Pty Ltd (1997) 112 NTR 1

Minister for Industrial Affairs v Civil Tech Pty Ltd (1997) 69 SASR 348

American Diagnostica Inc v Gradipore Ltd (1998) 44 NSWLR 312