CA on appeal from QBD (in the matter of the Arbitration Acts 1950-1979 and in the matter of an arbitration) before Staughton LJ; Swinton Thomas LJ. 11th October 1996

JUDGMENT LORD JUSTICE STAUGHTON:

1. This appeal, as it now is, because we have granted leave to appeal and an extension of time, from an unpromising exterior revealed some interesting points, at any rate for technicians of arbitration law.

2. There was, as I say, a need for an extension of time. That was because although notice of appeal was given within the time provided, it is thought that that might be ineffective because leave to appeal was needed. We have not entered into that; we have just granted the extension.

3. There was a civil engineering contract between the plaintiffs, Delta Civil Engineering Company, and the defendant, London Docklands Corporation. The Delta company were the contractors and the London Docklands were the employers. The contract contained an arbitration clause of some length. It began as follows:

"(1) Except as otherwise provided in these Conditions if a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be settled in accordance with the following provisions."

4. That seems to be as wide a clause as one could make for arbitration. There are some cases on the width of arbitration clauses. I believe that I was certainly in one and possibly two of them as counsel, but I have forgotten the names for the moment. Anyway, it would not help to refer to them. There are other provisions of the clause including, in particular, paragraph (2):

"For the purposes of sub-clauses (2) to (6) inclusive of this clause a dispute shall be deemed to arise when one party serves on the Engineer a notice in writing (hereinafter called the Notice of Dispute) stating the nature of the dispute. Provided that no Notice of Dispute may be served unless the party wishing to do so has first taken any steps or invoked any procedure available elsewhere in the Contract in connection with the subject matter of such dispute and the other party or the Engineer as the case may be has

(a) taken such step as may be required or

(b) been allowed a reasonable time to take any such action."

5. The problem in this case was one which, we are told, is a fairly common occurrence. The contractors encountered difficult ground upon which to carry out their works and claimed extra money in accordance with the provisions of the contract. There was, it would seem, agreement on the part of the employers that there should be some extra payment fairly readily. For a time there was a dispute as to how much extra payment. So it came about that the contractors gave notice referring this dispute to arbitration.

6. The notice is on a printed form of the Institution of Civil Engineers whose form of contract it is. It is headed:

'NOTICE TO CONCUR IN THE APPOINTMENT OF AN ARBITRATOR'. The arbitrator proposed was Douglas Malcolm Craig OBE. In the body of the form there is the sub-heading: 'Brief description of the dispute(s)':

"Claim made by the Main Contractor to be paid additional costs in dealing with unforeseen ground conditions associated with the construction of the works around Manhole 1."

7. After that notice had been given there was correspondence between the parties which resulted in two letters of some significance. The first is a letter from the employers to R Bowyer & Associates, the quantity surveyors on behalf of the contractors. It made proposals as to what the employers were prepared to pay. It came to a net figure of £93,000 plus interest to be agreed. That was on 18th October 1994, it was headed *'WITHOUT PREJUDICE'*. The quantity surveyors replied on 5th November in which they said:

"We are instructed and authorised to accept your offer in settlement of this dispute. No doubt the writer will now be able to agree the appropriate figure for 'interest' with your Mr Hugh Kimbell.

Once you have acknowledged our agreement we will notify the Arbitrator accordingly in order that he may issue his Award by Consent."

8. It will be noticed there is no provision in either letter dealing with the costs of the arbitration.

9. There was then some negotiation as to the amount of interest, or as one side called it, finance charges. That culminated in agreement on 16th December as to how much interest was to be payable for the period up to the 18th November. The figure agreed was £26,355.83. The Docklands Company said in a letter of that date:

"Following this agreement, I would ask you now to contact the Corporation's solicitors and complete the Award by Consent, obtain the Arbitrator's approval and publication thereof, thus bringing this matter to a close."

10. So both parties were agreed, at that stage, that there should be an award of the arbitrator by consent.

11. The matter continued for a while. The quantity surveyors drafted a Consent Award which contained provisions as to costs being paid by the respondents in the arbitration, that is to say, the employers. The solicitors for the Docklands Company replied saying: *"I should make it clear that there is no agreement to pay your Clients' costs, and if my Clients are willing to do so that is a gesture on their part and not a term of the Settlement Agreement."*

12. Next the Docklands Company wrote to the quantity surveyors saying that they were under no obligation to pay the costs of the contractors, they had made an offer to the contractors which had been accepted. The claim for costs was rejected.

13. The quantity surveyors passed that on to the arbitrator and said: *"Now that the Respondent has rejected the claim will you kindly deal with the matter in your award."*

14. The arbitrator then wrote to the parties saying that he had received the correspondence and if the parties were agreed on all matters except costs he would need to have written submissions about that. At that point the solicitors for the Docklands Company wrote to the quantity surveyors and sent a copy to the arbitrator saying that there was no jurisdiction for the parties or the arbitrator to open up the terms of the agreement; the terms provided for payment of a sum of money in full and final settlement. So, they were resisting any consideration by the arbitrator of the question of costs.

15. The arbitrator nevertheless went ahead and did consider that question, and he published an interim award on 1st May 1995. In that award he included a paragraph saying that the employers should pay the contractors' costs of the reference from first August 1994 to 11th April 1995 and that the employers should pay his costs of the arbitration and award which he fixed at £4,000. He also, incidentally, added another £5,000 to the interest awarded for the period to cover the period from 18th November to 16th of March.

16. The interim award was published on 1st May and there was a final award on 27th June 1995. We have not had to consider that, and I mention the first date as the earliest possible date from which time started to run, either seeking leave to appeal or an order remitting or setting aside the award. The employers did not embark on either of those causes; they waited to see what would happen next.

17. On 1st September 1995 the contractors issued a summons seeking leave to enforce the award as a judgment under section 26 of the Arbitration Act 1950. The summons came, in the first instance, before a Master of the Queen's Bench Division who refused leave. I shall have to return to his reasons later but, in a nutshell, it was that the arbitrator had no jurisdiction to make the award he did. There was an appeal from the Master's decision, and that came before Waterhouse J. He reached the same result by a slightly different route. He held that the arbitrator had jurisdiction *en Principe* to make an award, but not jurisdiction to make the award he did. The contractors now appeal against the decision of the judge.

18. I take first the reasoning of Waterhouse J. The first question that one asks oneself when enforcement of an award arises is whether the award was made with jurisdiction. The person seeking enforcement has to prove the matters which are set out by Devlin J in the case of ***Christopher Brown Limited v. Genossenschaft Oesterreichischer*** [1954] 1 QB, 8. *"The matters which the plaintiffs have to prove in order to succeed are, first, the making of the contract which contains the submission, secondly, that the dispute arose within the terms of the submission, thirdly, that arbitrators were appointed in accordance with the clause which contains the submission, fourthly, they must prove the making of the award, and lastly, that the amount awarded has not been paid."*

19. The burden of proof as to those matter rests on the party seeking to enforce an award. There is no presumption as to any of them merely by producing the award. Devlin J said at page 13: *"If the plaintiff takes upon himself the burden of proving the award, and fails to prove that the arbitrators had jurisdiction, his action fails, and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him."*

20. When the judge there referred to jurisdiction he was, as it seems to me, referring to the matters which he had mentioned earlier in his judgment. Of course they can be elaborated a bit. It must be shown that the dispute was one which came within the wording of the arbitration clause in the contract. It is not enough to show: (1) an arbitration clause, and (2) a dispute, if the dispute is about some totally different matter which cannot conceivably be fitted into the clause in the contract. Those are the matters which go to jurisdiction.

21. In this case there was a contract with a very wide arbitration clause. There was a dispute which initially was within the terms of that clause, and an arbitrator was appointed as provided in that contract. He did make an award, and the award has not been paid. So all those matters were proved.

22. It is not to the point to say that the decision which the arbitrator reached was wrong. That is, as it seems to me, what Waterhouse J was saying when he said that the arbitrator had jurisdiction to make an award but not this award. Once an arbitrator has jurisdiction, he has jurisdiction to be wrong as well as to be right. The parties have entrusted their fate to him, and they are bound by what he decides, subject to any application for leave to appeal or to remit or set aside the award. I would not accept the reasons given by Waterhouse J for refusing enforcement. I should perhaps have mentioned that the case of Devlin J was not concerned with enforcement under section 26, but with enforcement by an action at law. But his observations on what must be established apply equally to both cases.

23. Mr Darling for the employers likewise has not shown, if I may say so, great enthusiasm for the reasoning of Waterhouse J, and has preferred that of Master Hodgson. Master Hodgson put the matter in this way that the arbitrator simply had no jurisdiction by the time the matter came before him.

24. Now, Mr Darling has pursued that in two ways. First he says that the notice referring the dispute to the arbitrator was, as one might expect, narrower than the wide terms of the arbitration clause; but not wide enough to comprise the dispute that eventually did reach the arbitrator. I have already read the notice once, but perhaps I

should repeat it. What was referred was: *"Claim made by the Main Contractor to be paid additional costs in dealing with unforeseen ground conditions associated with the construction works around manhole 1."*

25. There are some cases on whether an arbitrator can travel outside what has been specifically referred in face of the dispute, and to what extent that is a fatal defect if it occurs.

26. I do not enter upon that because it seems to me that the description in this notice is quite wide enough to comprehend the actual dispute which reached the arbitrator eventually. If one said to the parties, *"Well, are you still dealing with the claim made by the main contractor who did not pay the additional costs?"* and so forth, the answer is inevitably, *"Yes, we are still trying to sort that out, although we have narrowed the area of dispute very considerably."* At least it was something ancillary to that claim. So I would not accept that argument.

27. The alternative way that Mr Darling puts it is this: he says that by the correspondence which I have referred to, in particular the first two letters, the parties narrowed by agreement the jurisdiction of the arbitrator. Of course parties can do that, and perhaps it is arguable that they did in this case. But it seems to me that there is a substantial difference between an inquiry as to whether the arbitrator initially had jurisdiction to enter upon his task, and whether his jurisdiction has thereafter been narrowed by agreement. It is established law that an arbitrator cannot conclusively decide his own jurisdiction initially. He may enquire into it, indeed he must if it is questioned; but he cannot bind the parties by concluding either that he has or has not jurisdiction. I say that that is established law on the assumption that the Arbitration Act 1996 has not yet come into force. Hereafter, as I believe, it will be no longer established law and the arbitrator will, in some circumstances, be able to bind the parties by a decision as to whether he had jurisdiction in the first place. That seems a curious example of the bootstraps effect; by deciding that he is an arbitrator he makes himself an arbitrator. The bill was promoted by the Board of Trade, so it must be what commercial people like.

28. As I say, that is the initial situation. But once there is an arbitration agreement and an arbitrator appointed under it, it seems to me that he is authorised to decide whether the parties have subsequently narrowed his jurisdiction. I would not go as far as to say that in all cases he has that power. If the parties got together and told the arbitrator that he was dismissed, as they had reached an agreement to that effect, it may be that he could not conclusively determine that they had reached no such agreement and that he was still in office. But for the sort of situation with which we are concerned today, it seems to me that the initial arbitration clause that the parties did agree on does confer on the arbitrator power to determine conclusively whether they have subsequently varied their agreement in the way that is suggested in this case. To my mind common sense requires that the arbitrator should be entitled to decide that rather than sending the parties off to the courts when, if a court decided that he still had jurisdiction, it would have to go back to him again.

29. So I reject also the second version of the Master's reasoning, that although there would have been jurisdiction under the agreement had it remained unamended, there was subsequently a variation of that agreement which the courts and not the arbitrator had the power to rule upon.

30. Consequently I would allow this appeal and make the order under section 26 of the Arbitration Act granting leave to enforce the award. We are told that the sum of costs in dispute is very small, and that large additional sums of costs have been incurred deciding it. It is not for us to reason why as sometimes happens, it has provided us with some interesting points to consider.

SWINTON THOMAS LJ:

31. I agree and there is nothing usefully that I can add.

ORDER: Appeal allowed with costs.

MR REESE QC and MR FRASWE (Instructed by Kidd Rapinet GU27 2H7) appeared on behalf of the Appellant
MR P DARLING (Instructed by Nabarro Nathanson W1X 6NX) appeared on behalf of the Respondent