Coral Seas Ltd v Gilmore [1981] SBFJCA 1; [1980-1981] SILR 119 (17 March 1981)

[1980-1981] SILR 119

IN THE FIJI COURT OF APPEAL FOR SOLOMON ISLANDS

Civil Appeal Case No. 17 of 1980

CORAL SEAS LIMITED

v

GILMORE

Fiji Court of Appeal
(Gould V.F. Henry and Spring JJA)
Sitting as Court of Appeal for Solomon
Civil Appeal No. 17 of 1980

16th and 17th March, 1981

Arbitration - remission of award - discretion of court meeting of arbitrators in absence of party - participation by umpire in proceedings - confusing award - effect of fraudulent misrepresentation on charter party - award set aside

Facts:

A number of disputes arising from the charter to the Appellant of a ship owned by the Respondent were referred to arbitration under the terms of the charter party. There were a number of changes of arbitrators and umpire. The umpire sat with the arbitrators at hearings and in conference. At one meeting of the arbitrators when evidence was tendered by the Respondent the Appellant did not appear. The award gave the option to the Appellant either to pay actual cost of repairs or a specified sum and required it to pay a sum continuing loss of profits until repairs were completed or the specified sum paid. On motion by the Appellant in the High Court (Cooke Acting C.J.) remitted the award to the arbitrators to hear further evidence. The Appellant appealed seeking an order setting aside the award.

Held:

1. The power of the High Court to remit an award is discretionary and if that court does not purport to decide on a basis of discretion the Court of Appeal may substitute the order which justice requires.

2. The findings of the High Court that the umpire did not make any decision enabled the court to say that the mere fact that advice was given by the umpire did not prejudice either party. However the procedure whereby the umpire and arbitrators sat together to draw up the award was not well advised although there was no breach of natural justice.

3. Even though notice was given of a meeting and the Appellant may have been unbusinesslike in not attending, the Appellant had a right to be present and had not waived that right. The holding of the meeting in the absence of the Appellant at which hearsay evidence was given was technical misconduct.

4. Once the Appellant was aware of alleged fraud in the charter party it should have elected either to take advantage of the fraud by bringing an action for relief to vitiate the whole agreement. This would involve a stay of the arbitration. By its conduct in

continuing the arbitration the Appellant had approbated and reprobated and could no longer rely on alleged fraud.

5. An award must be in a form capable of being enforced as a judgment. A discretion vested in the Appellant unlimited by time could give rise to substantial delay and even further litigation. The award did not embody sufficient clarity and certainty.

6. In all the circumstances the proper order was that the award of the arbitrators be set aside and the proceedings started again de novo

Cases referred to:

Re Baxters and Midland Railway (1900) 95 LT 20
Odlum -v- Vancouver City (1915) 85 L.J.P.O. 95
Potter -v- Newman (1835) 4 Dowling 504
London Export Corporation Ltd -v- Jubilee Coffee Roasting Co. Ltd (1958) 1 All ER 494
Margulies Brothers Ltd -v- Dafnis Thamaides and Co. (UK) Ltd. (1958) 1 All ER 777
Myron (Owners) -v- Tradex Export SA Panama City RP (1969) 2 All ER 1263
Eastcheap Dried Fruit Co. -v- NV Gebroeders Catz Handesvereeniging (1962) 1 Lloyd's Rep. 283

For Appellant: King and Knight
For Respondent: Sweetman

Gould VP: On the 10th April, 1979, an award was handed down by two Arbitrators, Paul Herbert Brown and Brian Edward Allen in proceedings by way of arbitration arising out of a dispute concerning a ship called the "Solsea". The present Appellant company moved the High Court of the Solomon Islands to set aside or remit the award on a number of grounds, and after evidence by affidavit and viva voce had been given the learned Chief Justice gave judgment on the 20th November, 1979, remitting the award in the following terms:-

"The award will, therefore, be remitted to Mr. Brown and Mr. Allen to enable them to give further consideration to the dispute in the light of any further evidence or arguments which either party may wish to submit. If eventually they are agreed, they will make a fresh award. If they are not agreed they will appoint an umpire"

The Appellant Company (hereinafter referred to as "Coral Seas") brought the present appeal from the High Court, asking to have the award set aside.

It has been common ground throughout the proceedings that the matter in issue is governed by English law.

As concisely as possible, the basic facts are these. In June 1978, the Respondent chartered the "Solsea" to Coral Seas for four months (with an option to renew) under what is commonly known as a Barecon charter. The "Solsea" was issued at Tulagi on the 7th April, 1978 with a safety certificate current for twelve months. The "Solsea" was used by Coral Seas for two months and five days, on various journeys, but on the 10th August, 1978, leaks were reported and the safety certificate was revoked on the 14th August, 1978. On the 21st September, 1978, notice of re-delivery under Clause 13 of the charter was given and on the 4th October, Coral Seas paid the Respondent $4,290 for the hire of the "Solsea" from 1st September, 1978, to the 6th October, 1978.

We have not been referred to any document setting out the details of the disputes actually referred to the Arbitrators for their decision. There are submissions in the nature of arguments and claims, but no definition of specific questions referred under Clause 25, which provides for reference to arbitration of "any dispute arising out of this charter". The award itself perhaps provides the best guide when it summarized the claims as follows:-

"The owner claimed (in summary)

(a) that the vessel had been damaged while on charter and for the cost of the consequent repairs;

(b) that the vessel had not been duly redelivered in accordance with the charter and that he was entitled to be paid either -

(1) the hire charge under the charter from the 7th October 1978 until the vessel is repaired and duly redelivered together with reimbursement of manning costs for the same period; or in the alternative;

(2) damages in respect of loss of profits from the 7th October 1978 until the vessel is repaired;

(c) costs incurred in respect of the arbitration.

The charter claimed (in Summary)

(a) that the revocation of the vessel's safety certificate with effect from the 31st August 1978 entitled the charterer to cease payments under the charter until the safety certificate was re-issued;

(b) the repayment of $4, 290 paid to the owner without prejudice on the 6th October being one month's hire charge together with interest thereon;

(c) that the charterer had no further liabilities under the charter after the 6th October 1978 having redelivered the vessel to the owner on that date, the repairs now found to

be necessary having arisen as a result of damage incurred before the start of the charter period and of latent defects and from fair wear and tear;

(d) that the charterer was entitled to rescind the charter in view of an undisclosed mortgage affecting the vessel;

(e) costs incurred in respect of the arbitration."

The award held that damages under four subheads resulted from groundings during the period of the charter and not from latent defects or fair wear and tear. As to this, the award said:-

"We award and direct that the charterer shall at its own discretion either:-

(a) effect the repairs necessary to put right such damage to the satisfaction of a surveyor appointed jointly by the owner and the charterer at the expense of the charterer; or

(b) pay to the owner the sum of $27, 400.00 (twenty seven thousand four hundred dollars) in respect of the costs of repairs."

The next important paragraph is No.3:

"We find that the vessel was not redelivered to the owner in accordance with the terms of the charter but that for all practical purposes the charter ceased on the 6th October 1978. Accordingly the owner is not entitled to the hire charge from that date. We find that the vessel was returned to the owner in an unusable condition, that the repairs which were at that date the owner’s responsibility were not such as to make the vessel

immediately unusable and vie award to the owner the following which we direct be paid by the charterer:-

(a) in respect of the loss of profits the sum of $27.66 a day for the period commencing on the 7th October 1978 and ending on the 30th day after either satisfactory completion of the repairs in accordance with paragraph 1 of the Award or payment of the owner of the sum specified in that paragraph;

(b) in respect of manning costs the sum of $6.13 a day for the period specified in sub-paragraph (a) above;

(c) in respect of the re-issue of a safety certificate, the costs actually charged by the Marine Department of the Ministry of Transport and Communications for inspecting the vessel on one occasion after the date of this award."

The award went on to say that the revocation of the safety certificate did not entitle the charterer to cease making the hire payments, that the payment of $4,290 was in accordance with the charter. As to the mortgage, paragraph 7 said:-

"The charterer did not discover the existence of the mortgage over the vessel until after the 6th October 1978, though the charterer was verbally informed by the owner before the start of the charter that the owner owed money on the vessel. The charterer has not suffered any loss by reason of the existence of the mortgage."

Reference must now be made to the position of the umpire, Harry James Broughton. The parties had serious difficulties in settling the question of who would be the arbitrators. There were many changes. They are set out in the judgment of the learned Chief Justice and we will not repeat them in full. Suffice it to say that originally Mr. Broughton was appointed by Coral Seas as their arbitrator and Captain Murdoch was appointed by the Respondent. The umpire, appointed by the arbitrators, was a Mr. Green. It is stated in the Chief Justice's judgment that Mr. Broughton requested the parties to make submissions and made an effort to get the arbitration under way. Then

there were changes. Mr Brown replaced Mr Broughton as arbitrator. After further changes Mr. Brown was re-appointed for Coral Seas and Mr. Allen appointed for the Respondent. In January, 1979 those two arbitrators appointed Mr. Broughton as their umpire. It is common ground that it was agreed that Mr Broughton should sit together with the arbitrators, and that in the particular small locality he was one of the few persons qualified in Law. The part played by Mr. Broughton, in Mr King's submission, went beyond permissible limits and amounted to misconduct. We should repeat, perhaps that no suggestion is made by anyone reflecting on the probity of Mr. Broughton or either of the arbitrators.

Mr King has submitted that the terms in which the Chief Justice remitted the matter, which we have quoted above, amounted to a complete remission of all matters in issue. The arbitrators are to make a fresh award, and if not agreed, it seems that they are to approach the question of appointment of an umpire de novo. His grounds appear to be that the award was "confusing", presumably a reference to the terms of the direction, put by way of alternative, that Coral Seas put right the damage, or pay $27,400 in respect of the costs. Another matter which the Chief Justice made the subject of criticism was the holding of the final meeting of the arbitrators and umpire, on the 26th March, 1979, at which the important question of damage was considered, without proper representation of Coral Seas. Though, in the following passage the Chief Justice criticised Coral Seas, it is clear that his final opinion was condemnatory of the procedure. He said: -

"It was vital for the Appellants to be at that meeting if they were to contest one of the key issues of the arbitration. They only approached one arbitrator for adjournment and gave no notice to the Respondent. I can only reach a conclusion that the matter was approached in a very unbusinesslike manner and not with the responsibility one would expect for such a crucial meeting.

However, for the arbitrators to come to a fair award and indeed so that justice can be done, in my opinion, they, the arbitrators, should have given the Appellants the opportunity of hearing the evidence, seeing the documents produced and cross examine if necessary. It was a vital issue in the proceedings. I think the award must have been affected by that opportunity not having been given to the Appellants."

The power of the High Court to remit an award is discretionary and the discretion is statutory: see section 22 of the Arbitration Act 1950 (Imp.) Hence, Russell on Arbitration (19th Edition) at p. 430 states that the decided cases do not cut down the jurisdiction of the court in any way, though they may afford valuable guidance as to principles. The duty still remains to look at the particular facts of the case, and if the facts are the same as those of earlier cases "no doubt the court will follow those cases" but the interests of justice decide the matter - Re Baxters and Midlands Ry (1900) 95 L.T. 20, 23. As to the position of this court on appeal from the High Court, Russell (op.cit.) at p. 436 quotes the Privy Council in Odlum v. Vancouver City (1915) 85 L.J.P. C. 95, as authority for the following statement - "The decision of the court will not be interfered with on appeal unless the discretion has clearly been misused". The report of the case indicates that their Lordships were speaking of the choice between setting aside or remitting.

In this Court the notice of appeal contains a number of grounds, but they were summarised by Mr. King into an attack upon the award on four grounds. These were:

1. At the final meeting of the arbitrators the Appellant Coral Seas was not present. At that meeting the whole question of quantum was decided and inadmissible evidence was tendered. No opportunity was given to the Appellant to canvas the evidence, cross-examine, or request a case stated, as thereafter the award was handed down.

2. The umpire interfered in the proceedings contrary to practice. It has been agreed that the umpire would sit together with the arbitrators to hear the evidence, but he interfered in a number of ways, including writing notes for their use and as to the conclusions they should come to, sitting down with them in conference, engrossing the award and (possibly) writing their reasons.

3. The arbitrators were confused on the question of damages, or totally - which was apparent on the face of the award. It was also found confusing by the Chief Justice. It should therefore be set aside.

4. The arbitrators ignored the legal and commercial effect of a fraudulent misrepresentation (contained in the charter party) as to the non-existence of a mortgage over the vessel.

As to the first of these we have already expressed the view that the Chief Justice in his judgment was condemnatory of the procedure in this respect. It is true that he did not characterise the conduct of the arbitrators as misconduct.

The arbitrators had given notice of the meeting saying that they would question both parties on numerous matters including the cost of repairs. Mr. Scholz, who had appeared as representing Coral Seas throughout, states that he told Mr. Brown he was going overseas on business and asked for an adjournment, and was told that would be done. However the meeting was not adjourned, but obtained the presence of Mr. Clement, another employee of Coral Seas, who remained at the meeting, but said he could not represent the company. The evidence put in was an estimate of repairs made by Dalton Engineering, apparently' the basis of the award for repairs, and tendered by the Respondent.

The learned Judge found that Coral Seas never intended to allow the arbitration to proceed in default of an opportunity being given to them to consider the Respondent's evidence and cross-examine if necessary. He further said that they should have had clear warning of the fact that this would happen if they failed to appear. However he appeared to qualify this by saying that Coral Seas had notice of the meeting of the 26th and knew "broadly" what the evidence was. To rely on a mere verbal approach to one arbitrator for an adjournment made it seem that Coral Seas were not interested. Then came the passage we have already quoted.

In our opinion, in spite of the criticism of Coral Seas' attitude and lack of responsibility, the Chief Justice was really saying that basically the arbitrators had heard one party in the absence of the other and in the circumstances that was not justified. It is implied that the effort to put the matter right by sending for Mr. Clement, who denied having any authority, was not enough. When he said the arbitrators should have given Coral Seas the opportunity of hearing the evidence, seeing the documents and cross-examining, to enable them to come to a fair award and so that justice could be done, he was making a finding of misconduct. We have no

reason to disagree with that finding. The evidence to be given in relation to damage was directly prejudicial to Coral Seas. While there may be cases in which parties waive this right to be present while evidence is given, it is not claimed that Coral Seas had done so by conduct or otherwise in this case. The arbitrators themselves wrote requiring the presence of both parties. Clearly Mr. Scholz must have considered the arrangement he had made was sufficient, for he not only did not attend himself but made no arrangement for anyone else to do so. If his action was unbusinesslike we do not think it should have been allowed to deprive him of a basic right.

We now turn to the submissions alleging interference by the umpire in the proceedings to an extent beyond the limits of practice and amounting to misconduct. Counsel said that in the course of the proceedings the umpire had made "rulings" on certain matters. The first is that he told the arbitrators that the bill of sale, the title to the "Solsea", was not relevant, as the question of title was not in issue. The second is that in relation to an alleged mortgage over the vessel the umpire gave a ruling that it did not appear to be relevant, but that if the Coral Seas case had been prejudiced the bill of sale could be accepted as evidence. (There seems to have been some confusion in terminology between the Bill of Sale i.e. transfers of the ship and a mortgage). A third category related to procedural matters - beyond mentioning that one of them is that the umpire decided that a statement from a witness (Ngisu) proposed to be called by Coral Seas could be used, rather than adjourn to have the witness brought, we do not think these need be dealt with. This course of action appears to have been acquiesced in by Mr. Scholz and is not, we think, significant.

The next category of complaint against the umpire involves the assistance he gave in such matters as drafting. It was submitted that he drafted notes of salient points at the end of each day’s evidence and gave copies to the arbitrators but not the charterer. Also he was involved in the drafting of the actual award. He sat down with the arbitrators and drew up the award. He sent off a draft to the arbitrators who revised it and forwarded it to him. Counsel put it that he settled the draft.

In the light of such matters as this, Mr. King submits that the umpire still saw himself as an arbitrator without divorcing himself from his previous role as such. The papers from the previous arbitration were handed on to the present arbitrators. It was suggested that section 9 of the Arbitration Act, 1950, to the effect that agreements providing for three arbitrators, two appointing the third, have effect as if they provided for an umpire and not a third arbitrator, had been overlooked. It was further

submitted that as a matter of correct practice the umpire sat as a matter of convenience and could not interfere in the process of judgment. The test is objective - not his intention but the effect and appearance of his actions. This submission no doubt arises from the finding in the judgment under appeal that the Chief Justice was certain that all the umpire's actions were intended to assist the arbitrators.

The Chief Justice dealt with the evidence touching upon the matters in counsel's submissions in some detail. In particular he considered the evidence of the umpire himself, that of the arbitrator, Mr. Brown and the affidavit of Mr. Scholz. That was a matter for the Chief Justice and we concern ourselves with the findings expressed in the judgment rather than the details of evidence. The Chief Justice said:-

"Again when appointed an umpire, I have to ask myself from events, was he not unconsciously continuing as an arbitrator. In my view he was not. The courts have shown considerable latitude to the actions of umpires but in this case did the actions of Mr. Broughton go beyond the bounds of the latitude permitted. In my opinion they did not. He gave rulings, he gave advice, he took part in discussions with the arbitrators, I cannot imagine him sitting there saying nothing, he drew up papers time and time again for them, all at their request. He stated they made the decisions and I believe him. If you take the action out of the hands of the arbitrators completely the courts will consider the action of an umpire to be misconduct."

The Chief Justice then quoted Potter v. Newman (1835) 4 Dowling 504, and continued: -

"Mr Broughton's actions in my opinion in no way can be considered misconduct in the technical sense. Yes, he assisted, he discussed matters with the arbitrators, he helped them in drawing the award but nowhere can it be said he made the decisions and not the arbitrators. Time and time again he made it clear that he advised the arbitrators, but it was their decision."

In view of the fitness of these findings, particularly the emphatic rejection of any suggestion that the umpire was making the actual decision, we do not find anything here which guides us usefully, remembering that what this Court has to decide is

whether the discretion of the learned Chief Justice was rightly exercised in favour of remitting, in lieu of setting aside. There is no doubt that arbitrators can accept expert assistance and legal advice in a proper case. On difficulty is that the person giving the advice here was the umpire and not a disinterested expert. In some circumstances that might lead to very material objections, but here the umpire had not entered upon the reference and never did, as the arbitrators agreed on the award. The case of London Export Corporation Ltd v. Jubilee Coffee Roasting Co. Ltd 1 All ER 494, which deals with the position of an umpire, is of no assistance on this point. The question was whether the umpire, who had entered on the reference, should be permitted to remain with an appeal board while they deliberated. It was held that the rules under which the arbitration was held prevented this, though Diplock J. expressed the opinion that, apart from the rule, the practice was not unreasonable. In the particular circumstances we do not find that the mere fact that the person giving the advice had been selected as umpire prejudiced either party.

There is another aspect of the same question however, which gives us some concern. It is that the assistance given by the umpire went so far as to include help in drawing up the award. To the extent that the help in that respect was mechanical it was not objectionable, any more than the help of a typist. But it is hard to accept that a person in the position of the umpire, who had been intimately connected with the controversy throughout, would have abstained from at least suggestion on the 0uestions being judicially considered. Mr. Brown in evidence said that the arbitrators and umpire sat down together and drew up the award. It would be wrong to place too much significance on that isolated sentence. The umpire himself said he made drafts from written instructions, and the Chief Justice; accepting his evidence, said that "nowhere can it be said he made the decisions".

In our view the procedure was not well advised, but as both arbitrators participated, it cannot be held that there was a breach of natural justice.

We will pass to the matter we have listed as Mr King’s fourth submission. It arises from the fact that in the charter party the Respondent answered with the word "None", Box 27, which reads "Mortgage(s), if any (01. 10)". The relevant words of Clause 10 are "Owners warrant that they have not affected any mortgage of the vessel ....." We have already set out paragraph 7 of the award which deals with this subject.

The crux of the matter is that Coral Seas say that they did not know that in fact a mortgage existed, until it was admitted by the Respondent in his opening address at the arbitration hearing on or about the 1st March, 1979. Much argument was devoted in the Supreme Court to the question whether there was any error on the face of the award making reference to this matter permissible. In our opinion that question is not relevant.

Clause No. 25 in the charter party provides - "any dispute arising out of this charter shall be referred to arbitration....." Insofar as misrepresentation concerning the mortgage is alleged (Mr Sweetman for the Respondent claimed that the provision amounted to a warranty only) the matter seems to be concluded against Coral Seas by the finding in the award that the charterer had suffered no loss.

It is sought, however, to argue the matter on the basis of fraud, on the footing that that would entitle Coral Seas to set the whole charter aside. The Chief Justice, as well as being of the view that no error of law appeared on the face of the award, expressed his conclusion as follows: -

"I repeat as I have stated before and following the decision in the case quoted that the Appellants as soon as they were aware of the mortgage and wished to rescind the contract they should have taken immediate action and that immediate action should have been to request a case stated to the High Court by the Arbitrators. They did not do so; hence their right to rescind the contract is lost."

We would put it this way. As soon as Coral Seas became aware of what they considered fraud it was incumbent upon them to elect whether to seek to take advantage of it or not. If there was fraud, the whole contract would be vitiated including the agreement to arbitrate. They could bring an action for such relief as they desired, applying at the same time for a stay of the arbitration. Probably they could apply for relief under section 24 (2) of the Arbitration Act, 1950, which also gives the court power to stay the arbitration. The point is that, to take advantage of the fraud, Coral Seas would have to forego the benefit of arbitration, and make their attitude

manifest. That is what they have not done. Instead they continued with the arbitration proceedings and are still doing so: a clear case of approbation and reprobation.

We are of opinion that there is no merit in this point. We would add, in case some of the wording of the judgment of the Supreme Court is misunderstood, that there has never been a finding of fraud on the part of the Respondent.

We return to Mr. King's third submission, which involves the award itself. The question of certainty and the element of confusion. As we read the judgment of the Chief Justice, in finding that the award is confusing he is also finding that it lacks certainty. In the immediately preceding passage he has been at least impliedly critical of the arbitrators' approach to the question of damages.

Mr King has referred to the award, relating to the repair of the vessel, as one of specific performance, which he criticised on a number of grounds: the loss of profits award was made without evidence and should have been limited to the estimated time required for repairs; manning costs should have been similarly limited; the cost of re-issue of the Safety Certificate, particularly in view of the loss of profits award, was not a charterer's obligation.

It must be remembered that an order for remission of the award has already been made by the High Court. There is no cross appeal, and unless we, on this appeal, accede to the prayer to set aside the award, the question of damages will with all other questions, go back for re-consideration in any event. In approaching the question whether we should so change the order, we are not concerned so much with the detailed awards listed above (though we incline to the view that Mr. King's criticisms in such matters as loss of profits have merit) as with the major question of the uncertainty of the award as to repairs. We would note, however, an element of uncertainty in the awards for loss of profits and manning costs, in that- they are payable up to unspecified alternative dates.

The award concerning repairs has been set out above. It gives Coral Seas a discretion, either to repair or to pay a sum certain. If the election is in favour of repairs, they are to be done to the satisfaction of a surveyor appointed by both parties.

The difficulty about such an award is that of enforcement. Under section 26 of the Arbitration Act 1950, an award may by leave of court or a judge, be enforced as a judgment and be entered as such. Although leave of the court is required, it is an implied term in an award for payment of money (since 1889) that the award be in a form which is capable of being enforced in the same manner as a judgment - see Russell (19 th Edn.) p. 402 and Margulies Brothers Ltd. v. Dafnis Thamaides & Co. (U.K.) Ltd. (1958) 1 All ER 777. In our opinion this award was essentially for payment of money. The discretion given to Coral Seas is not limited as to time. There is no certainty, or even, we think, likelihood, that the parties could agree upon a surveyor. There is no time limit for the exercise of the discretion or the appointment of the surveyor. In time, and with the taking of the necessary legal steps, these difficulties could be overcome by the application of the rule that where time is unspecified a reasonable time is allowed. Undoubtedly there could be substantial delay and even further litigation before the discretionary element of the award could be finalized and decided one way or the other and the award registered as a judgment for enforcement purposes.

We think that it was considerations such as these that induced the Chief Justice to describe the award as confusing and to order it to be remitted. He did so in words we have quoted above, and we note that, word for word, they are the same as those of the order made in Myron (Owners) v. Tradex Export S.A. Panama City R.P. (1969) 2 All ER 1263. That was a case, unlike the present, where no umpire had been agreed, but we have not been asked to attach any significance to the final words "..... they will appoint an umpire". The fact that it was a proper case for remission is not in dispute and was in fact conceded by Mr. Sweetman.

We are now asked to say that the Chief Justice did not exercise his discretion correctly in so limiting his order; we have quoted authority that suggests that we ought not to interfere unless the discretion has been "misused". We would not construe that word in a derogatory way, and take the view that where, as here, the court below has not purported to decide the question as one of discretion, we are at liberty to form our own view, in which we must be guided essentially by what the justice of the case requires.

The difference is that if the award is set aside the arbitrators are functus officio and any future proceedings must commence de novo. On the remission a good deal of retaking of evidence would probably be avoided, much material would remain, though the parties, under the order, would be at liberty to adduce more on any phase of the matter. The views of the Chief Justice and ourselves are almost co-incident in principle. Both courts are satisfied that the damages should have been dealt with, with greater clarity and certainty. If that were all, it could be cured by remission. But Both Courts condemn the procedure on the 26th March, 1979, amounting in our opinion to technical misconduct, when hearsay evidence on the important question of the cost of repairs, was received in the absence of proper representation of Coral Seas. This Court is also critical of the umpire's participation in the drafting of the award.

The choice between remission and setting aside in our opinion turns upon the question whether the same arbitrators could bring fresh minds to the question of damages, particularly the cost of the necessary repairs, unaffected by the previous evidence and proceedings. We think it would be very difficult for them to do so. As it is, Mr. Brown gave evidence in the Supreme Court that he had doubts about the repair costs and for that reason was responsible for the alternative option to repair being given to Coral Seas. The question of repairs, however it was approached, was bound up with other aspects of damages, for example loss of profits; once the question of liability was decided, this was the essence of the arbitration.

An associated factual matter, which has arisen since the termination of the proceedings below, is what has been called a matter of convenience. Mr. King raised it, and it is claimed that both arbitrators, Messrs. Brown and Allen have left the Solomons, and are unlikely to return. An affidavit has been put in, based inevitably on hearsay, information and belief, that Mr. Allen left 1½ years ago and now resides in Brisbane, Australia. Mr. Brown is also said to have left the Solomon Islands. Mr. Sweetman was able to confirm that Mr. Allen had left, but submitted that the court should not assume that the same arbitrators could not be reassembled.

It is an obvious difficulty. It can be assumed that if re-assembly is possible it would be an expensive matter. At the same time we have no information upon the availability of other suitable persons in the locality. Even if the matter went back on remission and even one arbitrator were unavailable and was replaced with the help of the court, the new arbitrator would presumably have to hear the evidence de novo. In Eastcheap Dried Fruit Co. v. N.V. Gebroeders Catz Handelsvereeniging (1963).1 Lloyd's Rep.

283, 285, Sachs J. did advert to the comparative expense of the two procedures as a factor in deciding between them, but it is not possible to have any guidance on such a question in the present circumstances. We conclude that it would be no more than speculation to place any weight upon this matter, and so refrain from doing so.

In all the circumstances, we think that the interests of justice will be best served by striking out the order for remission made by the Chief Justice and in lieu thereof ordering that the award be set aside. It is so ordered, and the Respondent will pay the costs of the appeal. There is no record of costs having been ordered in the High Court and we have not been asked to deal with that aspect of the matter. Our order is therefore limited to costs in this Court.