

SUPREME COURT OF NIGERIA
22ND APRIL, 1993. SC.43/1991

CORAM:- A. G. KARIBI-WHYTE, O. OLATAWURA,
U. OMO, I. L. KUTIGI, M. E. OGUNDARE, JJSC

Taylor Woodrow of Nigeria Ltd Appellant
And
Suddeutsche Etna-Werk Gmbh Respondent

ARBITRATION - where the award is good on the face -
whether the parties can object - powers
of the Court - where arbitrator has mis
conducted himself.

ARBITRATION - what amounts to a misconduct - prima
facie error of law - when the Court will
not interfere - refusal of arbitrator to
consider matter outside his reference -
effect thereof.

CONTRACT - breach of contract - where referred to
an arbitrator for determination -
arbitrator's award - when not to be
tampered with by court.

FACTS

The Appellant in 1981 by a contract between it and the Niger State Government (which was subsequently suspended), agreed to build a Specialist Hospital in Minna. By a sub-contract, the Appellant engaged the Respondent - a company based in Germany - to handle certain aspects of the contract subject to documented terms specifically agreed upon

by the parties. Appellant failed to secure irrevocable letters of credit as agreed which made it impossible for the Respondent to continue with the sub- contract. Respondent claimed against the Appellant for breach of contract and the matter was referred to an Arbitrator who found for the Respondent and made an award in its favour.

Appellant applied to the High Court of Lagos State by originating motion to set aside the award, or remit same to the Arbitrator for reconsideration. It was Appellant's contention that the Arbitrator misconducted himself by the erroneous interpretation of Clause 13 of the parties' subcontract. The high Court dismissed the application with costs. The Appellant being dissatisfied, appealed unsuccessfully to the Court of Appeal; and thereafter appealed to the Supreme Court.

HELD (unanimously dismissing the appeal upholding the decisions of the two lower courts).

1. Where the parties choose their own arbitrator to be the judge in the dispute between them, they cannot when the award is good on the face object to his decision either upon the law or the facts. (P.150)
2. The court has power to set aside an award made by an arbitrator where he has misconducted himself (S. 12(2) Arbitration Law Cap. 10 Laws of Lagos State) and since what would amount to misconduct is not stated in the said statute, it will be necessary to fall back on the common law to determine what constitutes mis

conduct. (P. 153)

3. From established legal authorities, it is misconduct on the part of the arbitrator where there is an error of law which appears on the face of the award on a point not specifically referred to the arbitrator for decision. (P. 158)
4. To determine what amounts to an error in law on the face of an award legal authorities have established that:-
 - (a) Where a specific question of law is submitted to the arbitrator, the court cannot interfere and
 - (b) Where matters in which a question of law becomes material are submitted, the court can and will interfere if an error of law appears on the face of the award. (P. 160 - 161)
5. The payment clause (clause 13) of the sub-contract between the parties was not specifically referred to the Arbitrator, its construction arose as a result of the defence put up by the Appellant to Respondent's claim. (P. 161)
6. The specific matter referred to the Arbitrator was whether by its failure to make payments to the Respondent by opening irrevocable letters of credit when due under the relevant document the Appellant was in breach of the sub-contract with the respondent. (P. 139)

7. Interpretation of clause 13 merely forms part of the Arbitrator's necessary reference. Since this is not his specific reference any error in its interpretation would
 5 not amount to any misconduct that would entitle the Appellant to have the arbitration award set aside.
 (P. 163-164)

10 8. The Arbitrator did not make any error in law in his interpretation of clause 13 having regard to the surrounding circumstances of this case. Nor is there any error of law apparent on the face of the award. (P. 168)
 15 (P. 177)

9. There is no fatal defect in the award made by the Arbitrator that will cause the court to intervene. Misconduct not having been established the court
 20 would not set aside the award or remit it to the Arbitrator for reconsideration. (p. 179)

10. The Arbitrators' refusal to consider a matter outside his
 25 jurisdiction raised by the Appellant cannot amount to misconduct seeing that introduction of such issue would amount to widening the scope of the parties' reference to the Arbitrator.

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REPRESENTATION

Adeniran Ogunsanya (Jnr) For the Appellant
 Chief Chuks Ikokwu, U. Alihonwu (Miss) For the Respondent

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CASES REFERRED TO

1. Kano State Urban Dev. Board v. Fanz Ltd (1986) 5 NWLR

2. Fuller v. Fenwick (1946) 16 L.J.C.P. 79; 136 ER 282
3. Hodgkinson v. Fernie 3 CB (NS) 189; 140 ER 712
4. British Westinghouse Co. v. Underground Electric Rys. Co. (1912) AC 673 HL.
5. Foli v. Akesa 1 WACA 1 5
6. Attah v. Amoah (1930) 1 WACA 15
7. Re Gregson v. Armstrong (1894) 70 L.T. 106
8. Bache v. Billingham (1894) 1 QB 107
9. Re Hoppere (1867) LR 2 QB 36 10
10. Walford, Baker & Co. v. Macfie & Sons (1915) 84 LJ K.B. 222
11. Re King and Duven (1913) 2 KB 32
12. The United Nigeria Insurance Co. Ltd v. Leandro Stocco (1973) 3SC 11 15
13. Anisminic v. Foreign Compensation (1969) 1 ALL ER 208
14. Champsey Bhara & Co. v. Jivrajs Balloo Spinning & Weaving Co. (1923) AC 480; 1923 ALL E.R. 235.
15. F.R. Absalom Ltd v. Great Western (London) Garden Village Society (1933) AC 392 HL 20
16. R.S. Hartley Ltd v. Provincial Insurance Co. Ltd (1957) 1 Llyod Rep. 21
17. Bookshop House Ltd v. Stanley Consultants Ltd (1986) 2 NWLR 87 25
18. Kelantan Government v. Duff Dev. Co. (1923) AC 395 HL
19. Wolveridge v. Steward 1 Cr. & M. 644 30
20. James v. Cochrane 7 EX 170.
21. Hamlyn & Co. v. Wood & Co. (1891) 2 QB 488
22. Knight v. Gravesend and Milton Waterworks Co. 2 H & N. 6 35
23. Attorney-General for Manitoba v. Kelly (1922) 1 AC 268
1. Re Arbitration Between Montgomery Jones & Co. And Liebenthal & Co. (1898) 78 LT 406

STATUTES REFERRED TO

1. Arbitration Law Cap. 10 Laws of Lagos State ss. 11 (1), 12(2)
- 5 2. Halsbury's Laws of England 4th Edn. Vol. 2 para. 622 pp.330-331 para. 623 p.334
3. Common Law Procedure Act 1854 s. 8.

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***LEAD JUDGMENT BY
OGUNDARE JSC***

15 This appeal raises the question when and in what circumstances, a court will disturb the award made by an arbitrator to whom the parties to a contract have voluntarily submitted a dispute arising between them for adjudication.

20 Taylor Woodrow of Nigeria Limited by a contract dated 23rd May, 1981 entered into by it and the Niger State Government, agreed to build a Specialist Hospital in Minna. By a sub-contract dated 21st September, 1981, supplemental to
25 this contract (known in these proceedings as the main contract) the said company (who is now the appellant before us and shall hereinafter be so referred to) appointed Suddeutsche Etna- Werk GMBH, a company based in Germany (hereinafter shall be referred to as the respondent) to execute the supply of installation and commissioning of air-conditioning work of the Specialist Hospital for a contract sum of N885,920,00. By Appendix II of the sub-contract, part of the contract sum of
30 N885,920.00, that is, N430,000.00 was to be paid for by the establishment of irrevocable letters of credit on stated dates to enable the respondent bring in fabricated materials and equipment needed for the air-conditioning work, into Nigeria. Ap-

pendix II reads:

"MINNA GENERAL HOSPITAL

APPENDIX II TO ETNA SUB - CONTRACT AGREEMENT

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TAYLOR WOODROW OF NIGERIA WILL PROVIDE IRREVOCABLE LETTER OF CREDITS AND NECESSARY DOCUMENTS UP TO THE FOLLOWING MAXIMUM AMOUNT:

<i>SHIPMENT 1 MAX. NAIRA</i>	<i>165,000</i>	<i>DATE NOV. 1981</i>
<i>SHIPMENT 2</i>	<i>150,000</i>	<i>FEBR. 1982</i>
<i>SHIPMENT 3</i>	<i>115,00</i>	<i>MAY 1982</i>

10

THE IRREVOCABLE LETTER OF CREDITS MUST BE ACKNOWLEDGED BY A GERMAN BANK AND MUST BE PAYABLE AT THIS BANK BY SHOWING THE NECESSARY DOCUMENTS. THE MONTHS STATED ARE THOSE IN WHICH THE LETTER IS TO BE RAISED.

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T.W.N. WILL HAVE ACCESS TO ALL QUOTATIONS AND L.P.O. MATERIALS TO BE IN ACCORDANCE WITH SPEC AND APPROVED BY THE ENGINEER. ETNA TO HAVE FREE CHOICE BY SELECTING THE MANUFACTURER.

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ETNA AGREES TO PAY THE 4 HANDLING CHARGE REQUIRED BY THE L.O.C.

DUE TO ETNA'S NON REGISTRATION IN NIGERIA, ETNA WILL OPERATE AS A DIRECT SUB-CONTRACTOR TO TAYLOR WOODROW. THEY WILL OPERATE UNDER THE COMPANY NAME OF T.W. THIS RELATIONSHIP IS PURELY FOR CONVENIENCE AND DOES NOT IN ANYWAY NEGATE ETNA'S RESPONSIBILITIES UNDER THE SIGNED SUBCONTRACT (NON - NOMINATED) AGREEMENT."

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By exchange of letters between the parties, the appellant requested the respondent to commence fabrication of the

materials for shipment. The respondent performed its part of

the bargain and had the materials fabricated to specifications and packaged ready for shipment. The appellant, despite efforts made, failed, however, to obtain the necessary import licence and Form M and to establish irrevocable letters of credit thereby making it impossible for the equipment to be brought into Nigeria. The respondent was thus unable to continue performance of the sub-contract and claimed there was a breach of contract on the part of the appellant. The main contract was subsequently suspended by the Niger State Government.

It was this breach that was the subject matter of the arbitration conducted by Professor A.B. Kasumu, S.A.N. The Arbitrator found in favour of the respondent and made an award in its favour in the sum of "DM 1,229, 092.52 or its equivalent in Naira at the date of payment in addition to the sum of N57,092.00" with costs assessed at N 10,000.00.

The appellant subsequently applied to the High Court of Lagos State by originating motion to set aside the award or, alternatively, remit the same to the said Arbitrator for reconsideration on the following grounds:

"(1) *The Arbitrator misconducted himself and/or the proceedings by misinterpreting the provisions of Clause 13 particularly Clause 13(5) of the sub-contract, thereby grossly failed by holding that the obligation on the applicant to open the letters of credit does not arise after the issuance of an interim certificate in respect of the equipment/materials but before. Thus the Arbitrator further failed to appreciate the correct*

intention/interpretation of Clause 13(5) as contained in the applicant's final address, before the Arbitrator.

- (2) *The Arbitrator misconducted himself and/or the proceedings in holding that the payment Clause as set out in Clause 13 of the subcontract must be read subject to the modification and obligations imposed on the applicant in Appendix II of the sub-contract when in fact no such submission was ever made at any time by the respondent and there exist no evidence to support this interpretation as set out in the award.* 5 10
- (3) *The Arbitrator misconducted himself and/or the proceedings by not considering at all the issue of waiver of rights as submitted by applicant as the issue of waiver would have determined at what period the applicant could have been guilty of breach of contract if guilty at all* 15
- 4) *The Arbitrator misconducted himself and/or the proceedings by not holding that the sub-contract had been frustrated and thereby decided the issue on the ground that the Applicant failed to obtain the Import Licence, Form M and open documentary evidence that the Import Licence and Form M had been obtained by the applicant, contrary to the letters in the Arbitrator's award.* 20 25
- (5) *The Arbitrator misconducted himself and/or the proceedings in holding that the provisions of Clause 7(1) of the sub-contract is limited only to cases of loss or damage whereas the provisions extend beyond the Arbitrator's interpretation.* 30 35
- (6) *The applicant holds that the Arbitral Award made in favour of the claimant is excessive."*

Grounds (3) & (4) were abandoned at the trial and were accordingly struck out. The learned trial Judge, after considering the submissions of learned counsel for the parties, in a reserved ruling, dismissed the application with costs. Being
5 dissatisfied with this decision, the appellant appealed unsuccessfully to the Court of Appeal. The appellant has further appealed to this Court upon three grounds of appeal which, without their particulars, read:

10 "GROUND 1 -

The learned Justices of the Court of Appeal erred in law in not considering whether error of law on the face of the Award complained of by the appellant as constituting or amounting to misconduct on the part of the Honourable Arbitrator rightly comes under paragraph 7 as established in the case of Kano State Urban Development Board v. Fanz Limited (1986) 5 N.W.L.R. (Pt.39) 74 that is, Error of Law which appears on the face of the Award, if the point of law erroneously decided was not specifically referred for the decision of the Arbitrator.'

25 GROUND 2 -

The learned Justices of the Court of Appeal erred in law in refusing to give construction to the payment Clause 13 of the sub-contract and erred in law in holding that the misconstruction or misinterpretation of the said payment Clause 13 which the appellant alleges constitute an error of law on the face of the Award, does not amount to misconduct on the part of the Honourable Arbitrator.

35 GROUND 3 -

The learned Justices of the Court of Appeal erred in law in not considering the legal and

*technical argument submitted by the appellant
establishing that the Award is bad in law."*

Pursuant to the rules of this Court, learned counsel for the parties filed and exchanged their respective written briefs of argument. In the appellant's brief the following four ques- 5
tions are set out as calling for determination, that is to say, -

1. Whether the learned Justices of the Court of Appeal
erred in law in not considering whether the error of
law on the face of the Award complained of by the 10
appellant as constituting or amounting to misconduct
on the part of the Honourable Arbitrator rightly comes
under paragraph 7 as established in the case of Kano
State Urban Development Board v. Fanz Limited 15
(1986) 5 N.W.L.R. (Pt.39) 74 at 77 that is, Error of Law
which appears on the face of the Award, if the point of
law erroneously decided was not specifically referred
for the decision of the Arbitrator.' 20
2. Whether the misinterpretation or misconstruction of
Clause 13 (Terms of Payment) of the sub-contract by
the Arbitrator constitutes an error of law on the face of 25
the Award, if it was established that the construction or
interpretation of Clause 13 was not specifically referred
for the decision of the Arbitrator and if established that
the said Clause 13 of the sub-contract makes the 30
Architect's certificate a condition precedent to payment.
Whether or not the Arbitrator can give an Award for
payment without the condition precedent to payment
having been fulfilled. 35
3. Whether it constitutes an error of law on the face of
the Award, if an Arbitrator reads a mode of payment to
modify a term of payment, whereas by the provisions

of the terms of payment, the Architect's certificate is a condition precedent to payment.

4. Whether the appellant is entitled to be indemnified in accordance with the provisions of Clause 7(1) of the sub-contract.

In the respondent's brief, on the other hand, two issues are set out as hereunder:

- 1 Whether the learned Justices of Appeal erred in law in holding that what the appellant called misconduct does not amount to same in law.

- 2 Whether the learned Justices of the Court of Appeal erred in law in holding that the Arbitrator did not misinterpret and misconstrue those clauses of the sub-contract and by implication dismissing appellant's argument on 'error of law'.

In my respectful view, however, having regard to the judgment appealed against and the grounds of appeal, the issues as set out in the respondent's Brief are to be preferred. These issues essentially are: When and in what circumstances a court will disturb an award made by an arbitrator and whether such circumstances exist in the case on hand.

The general rule is that where the parties choose their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good on the face object to his decision either upon the law or the facts. Maule, J stated the law in *Fuller v. Fenwick* (1846) 16 L.J.C. P.79; 136 E.R. 282, 285 in these words:

"If the case had been left to follow the ordinary course,

it would have been decided, as to the facts, by a jury, and, as to the law, by the judge, with an ultimate appeal to a court of appeal. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the whole to an arbitrator, thinking, 5 probably, that the facts would be more conveniently ascertained, and the law more conveniently determined by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law than the court. It is quite true that it is some times advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, 15 induced the courts to deal much more liberally with awards than was formerly their practice, and, generally speaking, to hold them to be final, unless some substantial objection appears upon the face of them." 20

Wilde, C.J. had, in that case, said:

"The question as to how far the court will interfere to 25 correct the mistake of an arbitrator in fact or in law, has been presented in every possible shape. In some of the cases the discussion has proceeded upon a supposed difference, - where a matter of law was in ques 30 tion, - between a lay and a professional arbitrator. Lord Ellenborough first, and, subsequently, all the judges, repudiated any such distinction, holding that, where the parties have thought fit to withdraw from the deci 35 sion of the ordinary tribunals, and have selected their own judge, they must be content to abide by his judgment. The question has also been discussed in cases

where some point of law has suddenly arisen in the course of the inquiry, and where, though the matter was present to the mind of the arbitrator, but little time was afforded for consideration; and the court have said,
 5 that whether the arbitrator was a professional man or a layman, they would not inquire whether his conclusion was right or not, unless they could, upon the face of the award, distinctly see that the arbitrator, professing and
 10 intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to law."

The law was firmly laid down by Williams J. in *Hodgkinson v Fernie* 3 CB (NS) 189, 202 140; ER 712, 717 when he said:

15 "The law has for many years been settled, and remains so at this day, that, where a cause or matter in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of
 20 all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, 'You have constituted your own
 25 tribunal; you are bound by its decision'. The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises
 30 on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted. I think it may be considered as established. This is simply the case of a reference to an arbitrator before whom has
 35 arisen a question of law which he has decided, and,

for the purpose of this motion, must be assumed to have decided it. I think we have no right to interfere."

This view has been followed by the English courts in numerous cases since then. See in this regard British Westinghouse Co. v. Underground Electric Rys. Co. (1912) 5 A.C. 673 H.L. The regret expressed by Williams J. has been repeated by some other learned Judges and the position seems to be that it is not desirable that the exception should be in any way extended. This statement of the common law received the approval of the defunct West African Court of Appeal as long ago as 1930 in Foli v. Akesa, 1 WACA 1, 2 - 3 and in Nana Sir Ofori Attah v. Nana Kwaku Amoah 1 WACA 15, 40. This common law rule apart, there are statutory provisions in Sections 11(1) and 12(2) of the Arbitration Law Cap. 10 Laws of Lagos State which empower the High Court of Lagos State to remit an award to the arbitrator or set it aside. The sections read:

"11 (1) In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire,"

"12(1) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside."

There are similar provisions in the Laws of the Federation and of other States in the Federation. By the provisions of section 12(2) the court has power to set aside an award made by an arbitrator where he has misconducted himself.

The word "misconduct" is not defined in the Law nor is it Stated therein what would amount to misconduct on the part of an

arbitrator to necessitate the setting aside of his award. It will be necessary therefore to fall back on the common law to determine what constitutes misconduct. I limit myself in this judgment only to this ground because it is the ground on which
5 the appellant applied to the High Court of Lagos State to set aside the award made by Professor Kasumu. What then constitutes misconduct at common law that will justify the setting aside of the award of an arbitrator or remitting it back to him
10 for reconsideration? Paragraph 622 of Halsbury's Laws of England 4th Edn. Vol, 2 at pages 330 - 331 sets out what constitutes misconduct and lists examples of acts that have been held to amount to misconduct.

15 *"622. WHAT CONSTITUTES MISCONDUCT, It is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire.*

20 *The expression is of wide import, for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it, and it is the court's function to ensure that the executive power
25 of the court is not abused. It is accordingly misconduct for an arbitrator to fail to comply with the terms, express or implied, of the arbitration agreement. But even if the arbitrator fully complies with those terms,
30 he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced. Much confusion has been caused by the fact that the expression 'misconduct' is used to describe both
35 these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However, on one or other of these grounds the*

expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere "technical" misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct. But misconduct occurs, for example:

- (1) *if the arbitrator or umpire fails to decide all the matters which were referred to him;* 10
- (2) *if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference; for example, where the arbitrator construed the lease (wrongly) instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorised directions to the parties; or where the arbitrator has power to direct what shall be done but his directions affect the interests of third persons; or where he decided as to the parties' rights, not under the contract upon which the arbitration had proceeded, but under another contract;* 15
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- (3) *if the award is inconsistent, or is ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least be clear beyond any reasonable doubt;* 30
- (4) *if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally* 35

and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated or where,
5 *the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators received further evidence from one without informing or hearing the other, or*
10 *where the umpire attended the deliberations of the appeal board reviewing his award:*

- (5) if the arbitrator or umpire has failed to act fairly to
wards both parties, as for example, by hearing one
15 party but refusing to hear the other, or by deciding in default of defence without clear warning, or by taking instructions from or talking with one party in the absence of the other or by taking evidence in the absence of one party or both parties, or by failing to
20 give a party the opportunity of considering the other party's evidence, or by using knowledge he has acquired in a different capacity in such a way as to influence his decision or the course of the proceedings, or by making his award without hearing
25 witnesses whom he has promised to hear, or by deciding the case on a point not put to the parties:
- (6) if the arbitrator or umpire refuses to state a special
case himself or allow an opportunity of applying to the
30 court for an order directing the statement of a special case;
- (7) if the arbitrator or umpire delegates any part of his
authority, whether to a stranger or to one of the parties,
35 or even to a co-arbitrator:
- (8) if the arbitrator or umpire accepts the hospitality of
one of the parties, being hospitality offered with the

intention of influencing his decision:

- (9) if the arbitrator or umpire acquires an interest in the subject matter of the reference, or is otherwise an interested party;
- (10) if the arbitrator or umpire takes a bribe from either party.

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In each of the foregoing cases the arbitrator or umpire has misconducted himself, and the court has power to set aside his award," 10

In *Kano State Urban Development Board v. Fanz Construction Company Limited* (supra), the Court of Appeal, per Ogundere J.C.A., on pages 89 - 90 of the Report restated the law in these terms: 15

"Secondly, under Section 12 of the Arbitration Law, a party to the submission may apply to the Court to remove the arbitrator who has misconducted himself. Also after the award but before leave of court to enforce it has been obtained from the court, a party may apply to the court, that the award be set aside because the arbitrator has misconducted himself or on the ground that the award was improperly produced. A breach of the rule of natural justice is a misconduct. See *Re Gregson v. Armstrong* (1894) 70 L.T. page 106 on the breach of the rule *audi alteram partem*, when the arbitrator obtained information from one party in the absence of the other he was said to have misconducted himself. It was also misconduct when an arbitrator examined a witness in the absence of one party who was not given an opportunity to cross 20
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examine the witness afterwards: Bache v. Billingham (1894) 1 Q.B. p. 107. In Re Hoppere (1867) LR 2 Q.B. p. 36, bias or the likelihood of it was regarded as misconduct when before making his award, an arbitrator
 5 dined with one of the parties. Receiving inadmissible evidence is misconduct, but only if the error appears on the face of the award. Walford, Baker & CO. v. Macfie & Sons (1915) 84 L.J. K.B. page 222; so is fraud
 10 or corruption of the arbitrator, so also is error in law which appears on the face of the award, and only if the point of law erroneously decided was not specifically referred to the decision of the arbitration: Re King and Drown (1913) 2 K.B. p.32. Otherwise a point of law
 15 should be referred to the High Court on a case stated: The United Nigeria Insurance Co. Ltd. v. Leandro stucco (1973) 3 S.C. p.11 at p.17. It is also misconduct for an Arbitrator to act outside his powers ultra vires, or in
 20 excess of his jurisdiction: Anisminic v. Foreign Compensation (1969) 1 All ER page 208 at p.223 - 224 where Lord Morris said:

25 *'If therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as is often expressed, on the face of the record) then*
 30 *the superior court could correct that error unless it was forbidden to do so. It would be so forbidden if the determination was 'not to be called in question in any court of law'. If so forbidden it could not then even*
 35 *hear argument which suggested that error of law had been made. It could, however, still consider whether the determination was within the area of the inferior jurisdiction.'*

On the authorities, it is misconduct on the part of the arbitrator where there is an error of law which appears on the face of the award on a point not specifically referred to the arbitrator for decision. This is the aspect of misconduct relied on by the appellant in these proceedings. 5

To determine whether there has been misconduct, one must necessarily first answer the question: What is an error in law on the face of an award? As was decided by the Privy Council in *Champsey Bhara & Co. v. Jivrajs Balloo Spinning & Weaving Co.* (1923) A.C. 480; (1923) All E.R. Rep. 235, per Lord Dunedin at pp. 487 - 488 of the former Report, the expression was thus defined: 10

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties rights depend to see if that contention is sound." 15 20 25

Where it is impossible to say, from what is shown on the face of the award, what mistake, if any, the arbitrator has made, or that the arbitrator has tied himself down, on the face of his award, to some special legal proposition which is unusual, the award will stand. 30

The learned authors of Halsbury's Laws of England 4th Edition at paragraph 623 on page 334 have the following to say on the subject: 35

"An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is

not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question-referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles or construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

But the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value."

Before I move to the facts of the appeal before us, I need point out the difference in the two types of cases of errors on the face of the award that have been recognised by

the authorities (1) where a specific question of law is submitted to the arbitrator, the court cannot interfere; and (2) where a matter or matters in which a question of law becomes material are submitted, the court can and will, interfere, if an error of law appears on the face of the award - See F. 5 R. Absalom, Ltd v. Great Western (London) Garden Village Society (1933) AC 392, HL.

In the appeal on hand, the appellant's complaint is that the Arbitrator in his interpretation of Clause 13 - the payment clause of the sub-contract between the parties made an error of law which is apparent on the face of the reasons given for his award. Clause 13 was not specifically referred to the Arbitrator. Its construction arose as a result of the defence put up by the appellant to the respondent's claim. The appellant had contended that as the Architect's certificate had not been issued in respect of the fabricated materials for the air-conditioning unit, payment was not due to the respondent and its claim must, therefore, fail. Dealing with this defence the Arbitrator observed: .

"Clause 13 of Exhibit A

Reliance was placed on this Clause as a defence to the Claim:

- (1) The first payment shall be due not later than one month after the date of commencement of the sub-contract works, or, if so agreed of off-site works related thereto and further interim payments shall be due at intervals not exceeding one month calculated from the date of the first interim payment. Interim payments shall be made in accordance with Appendix 1.
- (2) Interim payments shall comprise the total value of sub-

contract works, and, if so agreed, of off-site works related thereto, up to and including a date seven days before the date when each interim payment is due, less retention money and (if payment is made as provided in sub-clause (I) hereof) less discount as provided in Part V of the Appendix to this sub-contract and less any payments previously made under this Clause. Effect shall be given in interim payments to the valuation of variations and any amount ascertained under Clause 10 and 25 of this sub-contract. The sub-contractor shall provide any details reasonably necessary to substantiate any statement submitted by him as to the amount of any valuation under this sub-clause.

Where under the main contract the Architect has in the exercise of his discretion agreed to include in interim certificates the value of any goods or materials for incorporation in the sub-contract works before delivery thereof to or adjacent to the main contract works the contractor shall ensure that the benefit of such inclusion in interim certificates shall be reflected in interim payments under this subcontract. Provided always that the sub-contractor shall observe any relevant conditions set out in the main contract which have to be fulfilled before the Architect is empowered so to include the value of goods or materials not delivered to or adjacent to the works in interim certificates.

Relying on the above, counsel for the respondent in his written address submitted as follows:

'I submit that the provision as set out in Clause 13(5) is

very clear and not capable of having more than one meaning.

I submit that what this provision states is that the Architect has in the exercise of his discretion, has to agree to include in interim certificates, the value of any goods or materials for incorporation in the sub-contract works before delivery and it is after this is done that the contractor shall be bound to ensure that the benefit of such inclusion in interim certificates shall be reflected in interim payments to the benefit of the sub-contractor.

I submit that it is only after the provisions of Clause 13(5) has been complied with, that is, the Architect agreeing to include in interim certificates the value of any goods or materials for incorporation in the sub-contract works before delivery, that the respondent can now proceed to open the Letters of Credit.'

I do not see how the above submission can hold having regard to the obligation imposed on the respondents to open the letter of credit. This obligation does not arise after the issuance of interim certificate in respect of the equipment/materials before. If the respondents have defaulted in its obligation and has made it impossible for the equipment/materials to be on site for valuation and inclusion in the interim certificate, it will be absurd for it to be able to rely on Clause 13 as a defence to the claim being made by the claimants."

What was specifically referred to the Arbitrator was whether by its failure to make payments to the respondent by opening irrevocable letters of credit when due under Appendix II, the appellant was in breach of the sub-contract with the

respondent. To my mind, the provisions of Clause 13 must necessarily form part of this reference. To that extent therefore, whatever error, if any, the Arbitrator committed in the interpretation of that Clause would not amount to any misconduct to entitle the appellant to have the award set aside.

Even if I am wrong in the above conclusion, the question must still be asked: Is there any error on the face of the award in the Arbitrator's interpretation of Clause 13? I rather think not.

The learned trial Judge has this to say in his judgment at page 106 of the record of appeal:

"It is complained against the Arbitrator that he has misconstrued the entire payment clause as set out in Clause 13 of Exhibit 'BK I' headed 'Terms of Payment.' I adopt wholly the views which I have expressed earlier on in ground I of the application. At the risk of repeating myself there is nothing wrong on the face of the Award in this action. In the case of R.S. Hartley Limited v. Provincial Insurance Company Limited. (1957) 1 Lloyd Rep. P.21, it was alleged that an Arbitrator had misinterpreted a decision of the Court of Appeal to which he had briefly referred to in his Award and the award should be set aside:

Held: 'that there was nothing wrong on the face of the Award and they could not go into the facts found by the Arbitrator from which alone it could be gathered whether he misinterpreted the case or not.'

In this regard, this Court would not interfere with the award and it is my view that it is unnecessary for me to go into consideration of Clause 13 of Exhibit BK I, if I had to do so, there would have been no need for the

Arbitration in the first instance. I am of the well considered view that this leg of application has no substance or merit and it is also dismissed."

On appeal to the Court of Appeal, that Court, per Babalakin, J.C.A (as he then was) observed:

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"The heavy weather made about construction or interpretation of Clause 13(5) of exhibit BK1 - sub-contract was that the Honourable Arbitrator has failed to look into any authority on the principles of sales of goods to determine the Clause as a building contract. He then firmly submitted that 'the issue before the Arbitrator is a building contract - he did not advert his mind to building contract.'

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After reviewing submissions of counsel to both parties in this case, the learned trial Judge came to the following conclusions:

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'After a serious consideration of the submissions of Mr. Ogunsanya and Mr. Chuks Ikokwu on this matter, I must confess in this case that I have not been persuaded by the argument of the applicant's counsel that the Honourable Arbitrator has committed an error of law in his decision in the application placed before him. First and foremost, the complaint here is one based on misconduct on the part of the Arbitrator that would warrant this Tribunal to set aside the award. Moreover, the Arbitrator has not admitted that he made a mistake and thereby agreed to remit the award for reconsideration. It strikes me to note in this application that after reading Exhibit "BK4," (the award) I did not gain the impression that the Honourable Arbitrator decided

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this matter on the question of Sale of Goods as it is being canvassed heavily by the applicants. Moreover the issue of that Exhibit "BK1," particularly Clause 13(5) is a building contract, was not one of the issues submitted to the Arbitrator during the hearing of the
5 dispute between the two parties. It is for the applicant to allege the error of misconduct on the face of the award but all that the applicant has done here is to contend that it expected a different conclusion from
10 that reached by the Honourable Arbitrator. This is a misconception on the part of the applicants. I agree with the submission of the respondent's counsel that all the applicant is attempting to do here is re-open the
15 whole issue again. Having submitted themselves to the Arbitrator, it is unreasonable that the applicant would want to turn their back to the decision of the Arbitration, which decision had been agreed shall be FINAL
20 between the parties. I think I am right to rule here that this court has no jurisdiction to re-open all over again an Arbitration proceedings which has been conducted in accordance with the Agreement of the parties.'

25 On a calm view of the whole conduct of the Arbitration, I agree with the above conclusions of the learned trial Judge."

30 Learned counsel for the appellant has attacked in this Court the above conclusion of the Court of Appeal. Learned counsel, both in his written brief and in oral argument submitted that there was an error of law on the face of the record in the Arbitrator's interpretation of Clause 13 of the sub-contract
35 and urged us to set aside the award on this ground. He relied on *Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.* (supra) and *Bookshop House Ltd. v. Stanley Consultants Ltd.* (1986) 3 NWLR (Pt.26) 87 in support. He further

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submitted that the error was fundamental and material to the Arbitrator's decision. Learned counsel argued that by Clause 13(1) the Architect's certificate was a condition precedent to payment to the respondent and there could therefore, be no breach of contract on the appellant's part where the certificate had not been issued. It was further submitted that the Arbitrator committed an error of law on the face of the award when he held that the appellant's obligation to open irrevocable Letters of Credit as set out in Appendix II to the sub-contract must be read to modify Clause 13. 5 10

Learned counsel for the Respondent had argued to the contrary of the above submissions, learned counsel submitted that what the Arbitrator made of the defence of Clause 13 was only a conclusion in law and not a proposition of law and that if such conclusion was wrong it would not be a ground for upsetting the Award. He further submitted that it was not a misconduct for an Arbitrator to make a mistake of law and cited in support the case of *R.S. Hartley Ltd. v. Provincial insurance Co. Ltd* (1957) 1 LL L.R.21. It is finally submitted on this issue that the Arbitrator was right in his interpretation of Clause 13. 15 20 25

What the parties referred to their Arbitrator was whether the appellant was in breach of the contract with the respondent. The appellant, in its defence, while not disputing that payment was not made to the respondent in respect of the fabricated materials packed in West Germany and ready for shipment to Nigeria, contended that payment was not due to the respondent as the architect in charge of the main contract had not issued his certificate to that effect as required by Clause 13. The Arbitrator rejected the defence and held that as the appellant failed to obtain the necessary documents - import licence, Form M etc. - to facilitate shipment to Nigeria as it was obliged to do under Appendix II to the contract, it could not 30 35

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complain that there was no architect's certificate for goods that
were not yet at the site for the architect to view. It is this deci-
sion that the appellant claimed to be error in law on the face
of the award amounting to misconduct. With profound respect
to learned counsel for the appellant, I do not share his views.
5 I have already set out above the reasoning of the Arbitrator.
What the Arbitrator had done in this case in my respectful
view was to have regard to the surrounding circumstances of
the case for the purpose of making intelligible Clause 13 and
10 of applying it to the facts and for the purpose of incorporating
in Clause 13 the obligations set out in Appendix II to not think
the Arbitrator made any error of law in his interpretation of
clause 13 having regard to the surrounding circumstances of
15 this case. It would be asking for the impossible to expect the
architect to issue a Certificate in respect of materials not on
site for him to view. See: *Kelantan Government v. Duff Devel-*
opment Co. (1923) A.C 395; HL, where Viscount Cave L.C
20 observed at pages 411-413.

*"But it is said that, even so, it appears by the award that
he has used his knowledge of those facts for a wrong
purpose; that he was entitled to have regard to the
25 surrounding circumstances for the purpose of making
intelligible the terms of the deed and of applying them
to the facts, but not for the purpose of implying in the
deed a covenant which was not expressed therein. I
know of no authority for so limiting the ordinary rule.
30 No doubts surrounding circumstances may not be used
for the purpose of adding to a deed a stipulation to
which the parties did not intend by that deed to agree;
but if a judge or an arbitrator, knowing the terms of a
35 deed and the circumstances surrounding its execution,
is satisfied by those means that the parties intended by
that instrument to agree to terms which, though not
clearly expressed, are in his belief to be implied in it,*

*there is no reason why he should not give effect to his opinion. This view is consistent with such authorities as *Wolveridge v. Steward*; 1 Cr. & M. 644; *James v. Cochrane* 7 Ex. 170; and *Hamlyn & Co. v. Wood & Co.* (1891) 2 Q.B. 488; and is in accordance with the state-
ments of the law contained in *Knight v. Gravesend and Milton Waterworks Co.* 2H. & N. 6, 11. In the last-
mentioned case *Pollock CB.* said: "It is admitted that
there is no covenant, in express terms, contained in
the deed, that the parties must have intended to
stipulate that a particular thing should be done by
either of them, there is an implied covenant to do
it..... But in fact every case where a covenant
is implied must stand upon its own foundation and
there is great difficulty in arguing from the analogy of
other cases. The question always is, what is the
reasonable conclusion to be drawn from all the
matters to which the Court are entitled to look.*

In my opinion, therefore, the first point taken on behalf at the appellants cannot be sustained.

*But, secondly, it is argued that the conclusion of the award are inconsistent with the terms of the deed in
two respects - namely, in the finding (in clause 2) that it
was an implied term of the contract that the road
thereby agreed to be made should proceed in a
northerly direction, and also in the finding (in clause
3) that it was an implied term of the contract that the
railway therein referred to should be constructed, and
constructed within a given time. The finding that the
road was to proceed in a northerly direction appears
to me to be in no way contradictory to the terms of the
contract. The contract contains (as *Warrington L.J.*
pointed out) a provision which to some extent points
to that conclusion; and it may very well be that the*

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evidence of the surrounding circumstances (of which
this House has no knowledge) was such as to make it
impossible to give any other construction to the deed.
A stipulation that the road shall proceed in a northerly
5 *direction does not appear to me to be inconsistent with*
the express stipulation that its "line of route" shall be
laid down by the Government.

The finding of the arbitrator that there is to be
implied in the deed a contract to construct the railway
10 *has caused me more doubt; but upon the whole I have*
come to the conclusion that it affords no ground for
setting aside the award. I might myself have
experienced difficulty in finding such an implication in
15 *the contract; but this is immaterial, as the question is*
one of construction which (as I have indicated) it is for
the arbitrator and not for the Courts to determine. The
implication of a covenant to construct the railway is
20 *certainly not contrary to the Deed of Cancellation.*
There are provisions in the deed which cannot have
full effect unless the railway is made; such, for instance,
as the stipulation route of the railway has been settled,
25 *the provisions in the same clause for deviations from*
such line of route, the stipulation in clause 8 for the
grant of a mining lease after the construction of the rail
way has been completed, and the agreement in clause
30 *18 to make a cart road to the railway within four years.*
These stipulations may not be enough by themselves
to lead to an implication of a contract to construct the
line; but I am not prepared to say that these consider
ations, coupled with evidence of facts of which the
35 *courts know nothing, and into which they are not en*
titled to inquire, cannot properly have led the
arbitrator to his conclusion."

Learned counsel for the appellant relied on F. R.

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Absalom, Ltd. v. Great Western (London) Garden Village Society Ltd. (supra) - The facts in that case are as follows:

"A building contract contained a clause, numbered 30, in these words:

*The contractor shall be entitled...under certificates to⁵
be issued by the architect to the contractor... to payment
by the employer from time to time by installments, when
in the opinion of the architect actual work to the value
of 1000 pounds has been executed in accordance with¹⁰
the contract, at the rate of 90 per cent of the value of
the work so executed in the building and materials
actually on the site for use on the works until the
balance in hand amounts to the sum of 2000 pounds.'¹⁵*

*By clause 32, if any dispute should arise between the
employer, or the architect on his behalf, and the
contractors as to the construction of the contract or as
to the withholding by the architect of any certificate to²⁰
which the contractors might claim to be entitled, the
dispute was to be referred to an arbitrator.*

*By another clause, No.26, if the contractors should²⁵
suspend the work, except in case of a certificate being
withheld, the architect was empowered to give notice
to the contractors to proceed with the work with all
reasonable dispatch. Disregard of this notice might³⁰
involve the contractors in serious consequences.*

*During the progress of the work, after 9000 pounds or
more had been paid by the employers to the contrac³⁵
tors upon certificates given by the architect, the con
tractors claimed that in March 11, 1929, they were
entitled to a further substantial sum which had not been
included in the architect's certificates. The employers*

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*insisted that the contractors had been overpaid, and
that no certificate was due to them. The contractors
thereupon stopped work, and the architect served upon
them a notice under clause 26.*

5 *The parties then submitted to an arbitrator the 'disputes
in regard to (1) the issue of certificates and (2.) the
validity of the notice served by the architect under
clause 26' of the contract. The arbitrator found that on
10 May 11, 1929, there remained due to the contractors
a sum of 3793 Pounds, 17s. 10d., and awarded that
having regard to the provisions of clause 30' (which
he then set out as above) 'the architect had up to the
15 said 11th day of March, 1929, issued to the contractor
certificates in accordance with the terms of the contract.'*
*He further awarded that the notice given under clause
26 was properly given and was valid.*

20 *It was held that "the arbitrator had erred in his construc
tion of clause 30 of the contract in holding that, after
the value of work done and materials on the site had
reached the sum of 1000 pounds, it was still necessary
25 that a round sum of 1000 pounds should be due to the
contractors in order to entitle them to a certificate that the
construction of S.30 had not been expressly or specifically
left to the arbitrator, and that his award should be set aside
30 for error in law appearing upon the face of it."*

The speech of Lord Russell of Killowen is very instruc-
tive as to the difference between referring a specific question
of law to an arbitrator for a decision and referring disputes to
him in the decision of which a question of law becomes mate-
35 rial, as in the appeal on hand. The learned and noble Lord
said at pages 607 -610:

"My Lords, it is, I think, essential to keep the case where
disputes are referred to an arbitrator in the decision of

which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. 5 10

In the Kelantan case Lord Cave made this distinction clear, and came to the conclusion, after considering the submission and the pleadings there in question, that specific questions of construction had been submitted to the arbitrator for his decision, with the result that his decision could not be interfered with merely on the ground of its being wrong. He adds, however, that if it was apparent on the face of the award that the arbitrator in arriving at his decision had proceeded illegally (e.g., on inadmissible evidence) that would be ground for interference. Lord Parmoor makes the same distinction, and so does Lord Trevethin when he says 'This is not a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own.' 15 20 25 30 35

The same distinction appears in the judgment of the Privy Council in the case of Attorney - General

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for Manitoba v. Kelly (1922) 1 A.C. 268, 283, in which
the following passage occurs: 'Where a question of law
has not specifically been referred to an umpire, but is
material in the decision of matters which have been
referred to him, and he makes a mistake, apparent on
the face of the award, an award can be set aside on the
ground that it contains an error of law apparent on the
face of the award.'

In the case of *In re King and Duveen* (1913) 2
K.B. 32 the question submitted to the arbitrator was
whether upon a defined state of facts A. was liable
under a certain agreement to pay damages to B. moved
to set aside the award on the ground that the award
had found facts which showed that upon the true con-
struction of the agreement B. was entitled to damages,
and that accordingly there was error of law on the face
of the award. It was held that the award could not be
set aside, because a specific question of law had been
submitted to the arbitrator's decision.

Lord Warrington of Clyffe observed at pp.601 - 602 of the
Report thus:

"In my opinion, no such question as that answered by
para.3 was specifically submitted to the arbitrator for
his decision. At most it was incidentally involved in
the general question as to the validity of the notice
purporting to have been given under clause 26. In such
a case I am satisfied on the authorities that the award
may be set aside if there be error on its face. The
arbitrator has referred to the clause and thus in my
opinion has incorporated it in the award, so that the
error is patent on the face of it. I have already pointed
out what is in my opinion, the error he has fallen into.

On the whole, I am of opinion that an order in
terms shortly to be proposed from the Woolsack will

carry into effect the view I have above expressed. The reasons above given would in my opinion justify the reversal of the order of the Court of Appeal, but out of respect to the learned judges in that Court I have referred to the case of Hodgkinson v. Fernie 3 C.B. (N.S) 189; 27 L.J. (C. P.) 66. There the reference was as to the amount of damages for a collision at sea. The arbitrator awarded a lump sum. The defendant sought to show by affidavit that he had included an item which they alleged ought to have been rejected. Clearly, therefore, this was not a case of error on the face of the award.

I have also again read the opinions expressed in this House in Government of Kelantan v. Duff Development Co. (1). and I think it is clear that this case decides that, in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. It recognised the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally, as it is in the present case.'

On the other hand, in the British Westinghouse Co.'s case (1912) A.C. 673 no specific question of law had been, submitted. The matters referred were a claim for the price of good on the one hand and a counter claim for damages on the other. Questions of law arose which had to be decided as being material in the decision on the respective claims. The arbitrator sought for and obtained from a Divisional Court answers to a special case as to how the questions of law should be decided. He then published his award; from which it appeared that it was based upon the answers of the Divisional Court. The Divisional Court and the Court

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*of Appeal refused to set aside the award; but on
appeal to this House it was set aside on the ground
that the answers given by the Divisional Court were
erroneous, and that therefore there was error of law
appearing upon the face of the award.*
5 *The case of Hodgkinson v. Fernie 3 C.B. (N,S)*
189; 27 L. J. (C. P.) 66 was an action for damages, the
plaintiff's ship having been run down owing, as it was
alleged, to the negligent navigation of the defendant's
10 *ship. At the trial a verdict was entered for the plaintiff*
for damages, the amount being referred to an arbitra
tor. The arbitrator made an award, simply fixing the
damages at a sum of 3713 Pounds. Upon an applicat
15 *ion to set the award aside it was attempted to show by*
affidavit that the 3713 Pounds included a sum of 3496
Pounds which had been allowed by the arbitrator
owing to his having misconstrued a clause in a
20 *charterplay which had been entered into between the*
plaintiff and the Admiralty. It was held that no interfer
ence with the award was possible. This was simply a
case in which no specific question of law had been
25 *referred, and in which no error of law appeared on the*
face of the award The crucial question upon this
appeal appears to me to be this, to which class of cases
does the present reference belong? Is it a reference in
30 *which a specific question of law was referred to the*
decision of the arbitrator as the sole tribunal, or is it a
reference in which the questions of construction arise
as being material in the decision of the matter which
has been referred to arbitration? If the former, the
35 *appeal must fail. If the latter, it should succeed.*

*This is a question of some difficulty, as indeed
it was in the Kelantan case (1923) A.C. 395. In that
case Lord Cave seems to have thought that a specific*

question of law had been submitted. Lord Trevethin thought not. Lord Parmoor thought it unnecessary to

decide that point."

I must point out that in citing Kelantan Government's case, it is to show that on the facts of that case which were not too dissimilar to the facts of the case on hand, no error of law on the face of the award was found, although if such error had been found by the House of Lords it would not have made any difference to the conclusion since it was a case where a specific question of law was held to have been referred to the Court. In the present case, as in Absalom's case, it was so referred. But unlike in Absalom's case, I can find no error of law apparent on the face of the award shown.

Before I conclude I need point out that Section 11(1) of the Arbitration Law of Lagos State has not made any difference to the principles of the common law on the exercise by the court of its inherent power to remit a case to an arbitrator for reconsideration. In Hodgkinson v. Fernie (supra), considering section 8 of the Common Law Procedure Act, 1854 (which was in pari materia to section 11(1) under consideration), Cockburn C.J. said thus at pages 716 -717:

"The only remaining question is, whether or not the Court is called upon to interfere by reason of the 8th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. It is true that section gives the court authority, in any case where reference shall be made to arbitration, at any time, and from time to time, 'to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper. I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the

principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference.

And in *Re-Arbitration Between Montgomery Jones & Co, And Liebenthal & Co* (1898) LT 406, 408 Smith L.J, stated the general law thus:

"I for my part have always understood the general rule to be that the parties took their arbitrators for better or for worse, both as to decisions of fact and decisions of law. That is clearly the law. There are, however, certain grounds upon which the matter may be remitted to the arbitrator for reconsideration. Those grounds have been correctly stated by counsel for the respondents, and I will not recapitulate them."

The grounds stated by counsel for the respondents L, Sanderson Esq. and approved by the learned Lord Justice, are in these words

"The jurisdiction to remit the matter for reconsideration can be exercised only upon certain grounds. Those grounds are:

*(1) that the award is bad on the face of it;
(2) that there has been misconduct on the part of the arbitrator; (3) that there has been an admitted mistake, and the arbitrator asks that the matter may be remitted;*

and(4) where additional evidence has been discovered after the making of the award."

I can find no such fatal defect in the award on the appeal on hand to call for intervention by us as provided for under section 11(1). In my respectful view, misconduct has not been established. 5

The conclusion I reach, therefore, is that I agree with both the learned trial Judge and the Court of Appeal that this is not a case where a court would set aside the award of an arbitrator or remit it to the arbitrator for reconsideration. 10

The appellant has also complained in issue 4 that Clause 7(1) was never considered by the Arbitrator. Clause 7 was not specifically referred to the Arbitrator nor could it be said to be a question of law arising from the dispute referred to the arbitrator. The attempt made by the appellant during the arbitration proceedings to amend its pleadings to incorporate Clause 7(1) was rejected by the Arbitrator, and quite rightly in my view, as being irrelevant to the dispute before him. To allow the issue of Clause 7(1) to be introduced would amount to widening the scope of the reference by the parties to the Arbitrator. I do not see how the Arbitrator's refusal to consider matters outside his jurisdiction can be said to amount to misconduct. 15 20 25

The Court of Appeal, per Babalakin J.C.A, on this issue, observed: 30

"Another clause on which the appellant has an axe to grind is Clause 7(1) of exhibit 'BK 1 - the sub-contract which reads '

7 (1) Without prejudice to the obligations under Clause 5 of this sub-contract, the plant, tools, equipment or other property belonging to or provided by the sub-contractor, his servants or agents and in any case any 35

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*materials which are not properly on site for incorpora-
tion in the sub-contract works shall be at the sale risk
of the sub-contractor, and any loss or damage to the
same or caused by the same shall except for any loss
or damage due to any negligence, omission or default
5 of the contractor, his servants or agents, be the sale li-
ability of the sub-contractor who shall indemnify the
contractor against any loss, claim or proceedings in
respect thereof.*

10 Both the Arbitrator and the learned trial Judge found
that the issue in relation to this Clause is irrelevant to the is-
sues raised before the Arbitrator.

15 It was also held that a consideration of the said section
7(1) would be going outside the scope of the issues joined by
the parties before the Arbitrator.

I agree with the views of both the Arbitrator and that of
20 the learned trial Judge on this issue as well.

It would appear that what learned counsel for the
applicant is attempting to do is to reopen the arbitration at other
fronts on the fronts on which the parties agreed and contested
25 the Arbitration failed. I hold that he is not entitled to do this.

The nature of Arbitration Award is that parties choose
their own Judge and a party is not entitled to object to the
final decision reached in the award simply because the award
30 is not in his favour.

He can only do so on the grounds that have been ear-
lier examined above in this judgment. The nature of awards
in Arbitration proceedings was clearly shown in the case of
35 *Foli v. Akese (1930) 1 WACA 1* where the West African Court
of Appeal stated as follows:-

*'It will be as well to consider first the principles by which
the Court should be guided in setting aside the award*

of an arbitrator whose decision it has been agreed shall be final. These may be summed up in the statement that in submissions to arbitration the general rule is that as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts.'

The learned trial Judge was therefore right in resisting the efforts of learned counsel for the appellant to re-open this Arbitration proceedings which made a final award." I agree entirely with the above view.

The net result is that I find no merit in this appeal which I accordingly dismiss with N1,000.00 costs to the respondent.

KARIBI-WHYTE JSC

I have read the judgment in this appeal of my learned brother Ogundare, J.S.C. I agree that this appeal lacks merit and ought to be dismissed.

The two issues for determination in this appeal as formulated by learned counsel to the respondent appear to me to cover the issues raised in the grounds of appeal. I adopt them. These are-

- "1. *Whether the learned Justices of the Court of Appeal erred in holding that what the appellant called misconduct does not amount to same in law.*
2. *Whether the learned Justices of the Court of Appeal erred in law in holding that the Arbitrator did not misinterpret and misconduct those clauses of the sub-contract and by implication dismissing appellant's*

argument on 'error of law'."

It is a well settled general rule that where parties have chosen their own arbitrator to be the judge in the dispute, they
 5 cannot object to his decision either upon the law or on the facts when the award is prima facie good. See Maule J in Fuller v. Fenwick (1846) 16 L.J. CP.79. In Montgomery Jones & Co. and Liebenthal. In re (1898) 78 L.T.408. Smith L.J. expressed
 10 the law very succinctly when he declared:

*"I for my part have always understood the general rule to be that parties took their arbitrators for better or for
 15 worse both as to decisions of fact and decisions of law. That is clearly the law."*

The rule therefore is that the Court will not interfere to set an
 20 award aside unless error is clearly apparent, and manifest on the award.

The findings in the two courts below is that appellant
 25 has been unable to show any misconduct committed by the Arbitrator. It was also not established that the Arbitrator misinterpreted or misconstrued any of the provisions of the sub-contract (Exhibit 'BK 4') in the circumstances. There is no doubt that in the absence of proof of any errors of law or fact prima
 30 facie the award (Exhibit 8 K4) clearly appears to have met all the requirements of a valid award. See Kobina Foli v. Obeng Akese (1930) 1 WACA 1; Nana Sir Ofori Atta v. Nana Kwaku Amoah (1930) 1 WACA 15.

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 For the reasons I have given above, in addition to the more detailed reasons in the judgment of my learned brother Ogundare, J.S.C. with which I have already signified my agree-

ment, I hereby dismiss this appeal.

Appellant shall pay N1,000 as costs to the respondent.

OLATAWURA JSC

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I had the advantage of reading in draft the judgment of my learned brother Ogundare. J.S.C just delivered. I agree with his reasoning and conclusions, I will also dismiss the appeal with costs assessed at N 1,000.00 in favour of the respondent.

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OMO JSC

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I have had the opportunity of reading in draft the judgment of my learned brother. Ogundare, J.S.C.

Sections 11(1) and 12(2) of the Arbitration Law Cap. 10 Laws of Lagos State empowers the High Court of Lagos to remit an award to the arbitrator of set same said in the following circumstances:-

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"11(1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them to the reconsideration of the arbitrators or umpire."

"12(2) Where an arbitrator or umpire has misconducted himself, or an arbitration award has been improperly procured, the court may set the award aside."

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Section 11(1) (supra) is not applicable to the facts of this case. It is Section 12(2) (supra) which is relevant; and having regard to the grounds of appeal filed by the appellant and issues framed by both sides, the basis for appellant's complaint

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is the misconduct of the arbitrator. What constitutes "misconduct" by an arbitrator has been fully considered at length in the lead judgment of my learned brother aforementioned. In the course of that exercise important decision, some of them
 5 relied on by counsel have been considered. These include Absalom Ltd. Vs Great Western (London) Garden Village Society Ltd. (1986) A.C, 392 (HL), Bookshop House Ltd vs. Stanley Consultants Ltd., (1986) 3 NWLR (Pt.26) 87; R.S.
 10 Hartly Ltd vs. Provincial Insurance Co Ltd (1957) 1 L.L.R. 21,; Kelatan Government vs Duff Development Co. (1923) A.C. 395, (HL). I agree with the conclusion of my learned brother that no misconduct has been successfully established
 15 against the arbitrator.

It would appear that what appellant is striving to do is to change a decision of the arbitrator which does not favour it. This it cannot do. It has chosen an arbitrator whose decision is
 20 final and binding.

For these reasons and the fuller ones set out in the lead judgment, which I adopt as mine, I also dismiss this appeal with N1,000 costs to the respondent.

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KUTIGI JSC

The facts have been clearly set out in the lead judgment of my learned brother Ogundare, J.S.C,
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I agree with Chief Ikoku learned counsel for the respondent that the two issues for determination in this appeal
 35 are -

1. Whether the learned Justices of the Court of Appeal erred in law in holding that what the appellant called

misconduct does not amount to same in law.

2. Whether the learned Justices of the Court of Appeal erred in law in holding that the Arbitrator did not misinterpret and misconstrue those clauses of the sub-contract and by implication dismissing appellant's argument on "error of law". 5

I am inclined to agree with the finding of the High Court and the Court of Appeal that from the totality of the submissions of counsel for the appellant, he was unable to show that the Arbitrator committed, let alone guilty of, any act of misconduct in the matter. Equally it was not established anywhere that the Arbitrator misinterpreted or misconstrued any of the provisions of the subcontract (exhibit BK,I). The award (exhibit BK,4) in this case clearly appears to have met all the requirements of a valid award as no error of any kind on its face has been shown to us. We have no reason to interfere. (See *Folii v. Akese* (1930 1 WACA 1). The appeal lacks merit. 10 15 20

For the more detailed reasons given in the judgment of my learned brother Ogundare J.S.C., with which I agree, the appeal is dismissed with N1,000 costs against the appellant. Appeal dismissed. 25

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