

Richard John Money

Appellant

v.

- (1) Robert Arthur Playle
David Larkin
Pakieto Fale
- (2) Ven-Lu-Ree Limited
- (3) Stuart Craig Ennor

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
27TH JULY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[Delivered by Lord Goff of Chieveley]

This appeal arises out of an award made by an Umpire, Mr. S.C. Ennor, on 26th November 1987. On 30th March 1988 Chilwell J., on an application asking that the award be set aside or remitted to the Umpire, held that there was an error of law on the face of the award and ordered that the award be remitted to the Umpire for reconsideration by him. On 7th October 1988 the Court of Appeal of New Zealand reversed the decision of Chilwell J. The appellant now appeals against the decision of the Court of Appeal by leave of that court.

The appellant is Mr. Richard John Money, a shareholder in a company called Ven-Lu-Ree Limited, the second respondent. The first respondents are Mr. Robert Arthur Playle, Mr. David Lakin and Mr. Pakieto Fale; they are the remaining shareholders in Ven-Lu-Ree Limited. The dispute relates to the sale of Mr. Money's shares in Ven-Lu-Ree Limited to the remaining shareholders. Their Lordships take the statement of facts from the opening paragraphs of the Umpire's award.

They read as follows:-

1. On 9th September 1986 Mr. Money met with Mr. Playle, one of the Defendants, and Mr. Rennie, a non-shareholder/director and at that meeting it was agreed that Mr. Money's shares would be sold to the remaining shareholders; that Mr. Money's salary and superannuation would continue for a period of six months or the earlier payment for the shares; that Mr. Money would have the use of the van; that the 30th June 1986 be the date for the valuation of the shares with provision for stocktaking and some discussion as to payment of moneys held in private sources.
2. Mr. Money was at that time paid a cheque for \$23,172.00 being a six-months lump sum salary payment.
3. There were concerns on each side relating to the work required of the other in the matter of completing stocktaking, with letters passing from Mr. Playle to Mr. Money on 23rd October 1986 and from Mr. Money to Mr. Playle on 30th October 1986.
4. A meeting of Directors was held on 17th November, attended by the same persons who attended the September meeting, with Mr. Lakin and Mr. Pakieto also attending that meeting. Messrs. Playle, Lakin and Pakieto were the shareholders in Ven-Lu-Ree Limited. At the November meeting there was a discussion about the correspondence and an agreement that in lieu of the van which was to be returned to the company a payment be paid to Mr. Money. There was discussion about extra payments over and above the monthly salary cheque and the Minutes signed by all those present other than Mr. Money also noted that it was agreed that payments and privileges would cease on the expiry of the sixth month, i.e. 9.3.87.
5. On 6th March 1987 Mr. Money wrote again to Mr. Playle complaining that there had been no reply to his letter of 30th October and that his salary had now been stopped. The letter of 30th October was discussed at the meeting on 19th November and the salary had been prepaid in September for the six-months period. In that letter Mr. Money purported to withdraw his offer to sell his shares and indicated six matters on which he would require to be satisfied before he would reconsider. All the other Directors signed the letter of reply of 8th April.

6. Mr. Money in June 1987 commenced proceedings in the High Court (CL 23/87) in which he sought relief under Section 209 of the Companies Act 1985 and an Order that the Defendants should purchase his shares at such price as the Court should direct. The Defendants' position was set out in their Statement of Defence. (In that proceeding they were named as Second Defendants and the company Ven-Lu-Ree Limited was named as First Defendant).
7. In August 1987 the parties agreed that the Defendants would buy Mr. Money's shares and the price to be paid was to be fixed in terms of the Order above referred to which was later made by the High Court with the consent of the parties."

The order above referred to was a consent order made by Henry J. sitting in the High Court at Auckland on 1st September 1987. It was thereby ordered that the price to be paid for Mr. Money's shares was to be determined by arbitration, and that the arbitrator was to determine the outstanding disputes between the parties, in particular the date at which Mr. Money's shares were to be valued. The two arbitrators appointed under the consent order were however unable to agree on that point, which they then referred to Mr. Ennor as Umpire. In order to determine that question, he had first to consider whether the agreement between the parties of 9th September 1986 constituted a binding agreement. His conclusion was that it was a binding agreement, and that by that agreement the agreed date for the valuation of the shares was 30th June 1986.

The Umpire set out in detail in his award his reasons for reaching the conclusion that the agreement of 9th September 1986 was a binding agreement. It was that reasoning which was subject to attack before Chilwell J. in these proceedings. The Umpire's conclusion was expressed in the following paragraphs in his award:-

- "9. There are material differences between the hand-written note of the Directors' meeting of 9th September 1986 made by Mr. Money on the one hand and the typescript memorandum on the letterhead of Ven-Lu-Ree Limited and signed by Messrs. Rennie and Playle on the other, but neither record makes specific provision as to how the valuation of the shares was to be agreed. Both memoranda record that the 30th June 1986 was to be the appropriate date, Mr. Money's memorandum reading:-

'Financial position as at 30.6.86 to be used for share valuation purposes.'

and the typescript Minute of the other Directors read:-

'Mr. Money suggested that the 30th June 1986 be the date for the valuation of the shares, this was agreed.'

The Plaintiff in his Statement of Claim also repeated that the shares were to be valued as at 30th June 1986.

10. Neither memorandum set out the formula for fixing the value. Messrs. Money and Playle in evidence each said that each side was to obtain a valuation once the accounts were available from their own accountants. Mr. Playle asserted and Mr. Money denied that there was an agreement that any difference between the accountants would be resolved by arbitration. Having seen and heard the two witnesses on this topic (Mr. Rennie was not called) and noting as well that the memorandum signed by Mr. Playle makes no provision for that method of creating certainty of a contract price I find as a fact that on the 9th September 1986 whilst the parties referred to the accounts going to the two accountants for valuation assessment there was no express agreement for any difference to be resolved by arbitration. ...
12. Whilst I have found that there was no specific agreement as to arbitration or as to the method of the ultimate fixing of the value of shares it was clear from the evidence of both Mr. Money and Mr. Playle that each had in mind that arbitration procedures could be used. In my view, therefore, it is valid to imply a term in the agreement of 9th September 1986 that any difference between the accountants would be fixed by arbitration. ..."

The Umpire therefore determined that the agreement of 9th September 1986 was a binding agreement, and that the date fixed under that agreement for the valuation of the shares, viz. 30th June 1986, was the appropriate date.

Chilwell J. held that the Umpire had erred in law in reaching that conclusion. He referred to the judgment of the Privy Council in *Aotearoa International Ltd. v. Scancarriers A/S* (1985) 1 NZLR 513 and in particular the passage at page 556 in which Lord Roskill, delivering the judgment of the Judicial Committee, said:-

"Their Lordships sympathise with a wish not to allow parties who have made a firm but uneconomic bargain too readily to escape from its bonds when it subsequently proves financially disadvantageous. But the first question must always be whether any legally binding contract has been made, for until that issue is decided a Court cannot properly decide what extra terms, if any, must be implied into what is *ex hypothesi* a legally binding bargain, as being both necessary and reasonable to make that legally binding bargain work. It is not correct in principle, in order to determine whether there is a legally binding bargain, to add to those terms which alone the parties have expressed, further implied terms upon which they have not expressly agreed and then by adding the express terms and the implied terms together thereby create what would not otherwise be a legally binding bargain."

Chilwell J. then concluded that the Umpire had implied a term, that the parties had agreed to submit disputes to arbitration, for the purpose of creating a contract for the parties, and therefore had erred in law. The Court of Appeal however took a different view. They considered that the Umpire had concluded that the parties had agreed to buy and sell the shares at a valuation, and only then held that there was a term, to be implied into the concluded contract, that disputes should be referred to arbitration. Sir Robin Cooke P. said:-

"... I think that normally an agreement to buy and sell at valuation implies the objective test of a fair valuation and is sufficiently certain. If necessary the Court can arrive at the figure on evidence, even though the evidence on the two sides may very well be conflicting. ... Further, I think that reading Mr Ennor's award fairly and as a whole it was just such a contract that in effect he found here. He does not draw any subtle distinction between price and valuation but uses the expression 'valuation' or 'value' about a dozen times in his reasons. In substance he found an agreement to buy and sell at a fair valuation as at 30 June 1986. To read his reasoning in any other sense seems to me, with great respect to the judgment under appeal, to be to go further in the direction of a rather strict interpretation of an award than is necessary on the prevailing approach by the Courts to arbitration."

The same conclusion was reached by Richardson J. and Bisson J. Richardson J. said:-

"In the present case it comes, in the end, to a fair reading of the award. Read as a whole, I am driven to the conclusion that the agreement which the umpire found as in paragraph 1 was that the sale price should be the value of the shares as

at 30 June 1986 which carries the necessary implication, reinforced by the intended reference to accountants, that the value required should be the fair value of the shares as objectively ascertained on consideration of the company's accounts."

Bisson J. said:-

"The principal ground for the conclusion of Chilwell J was that the umpire went beyond the words the parties used and created a contract where none had existed. With respect I do not share that view. In my view the parties to the share sale had agreed on a price to be fixed by valuation. That was their formula for the determination of a fair price."

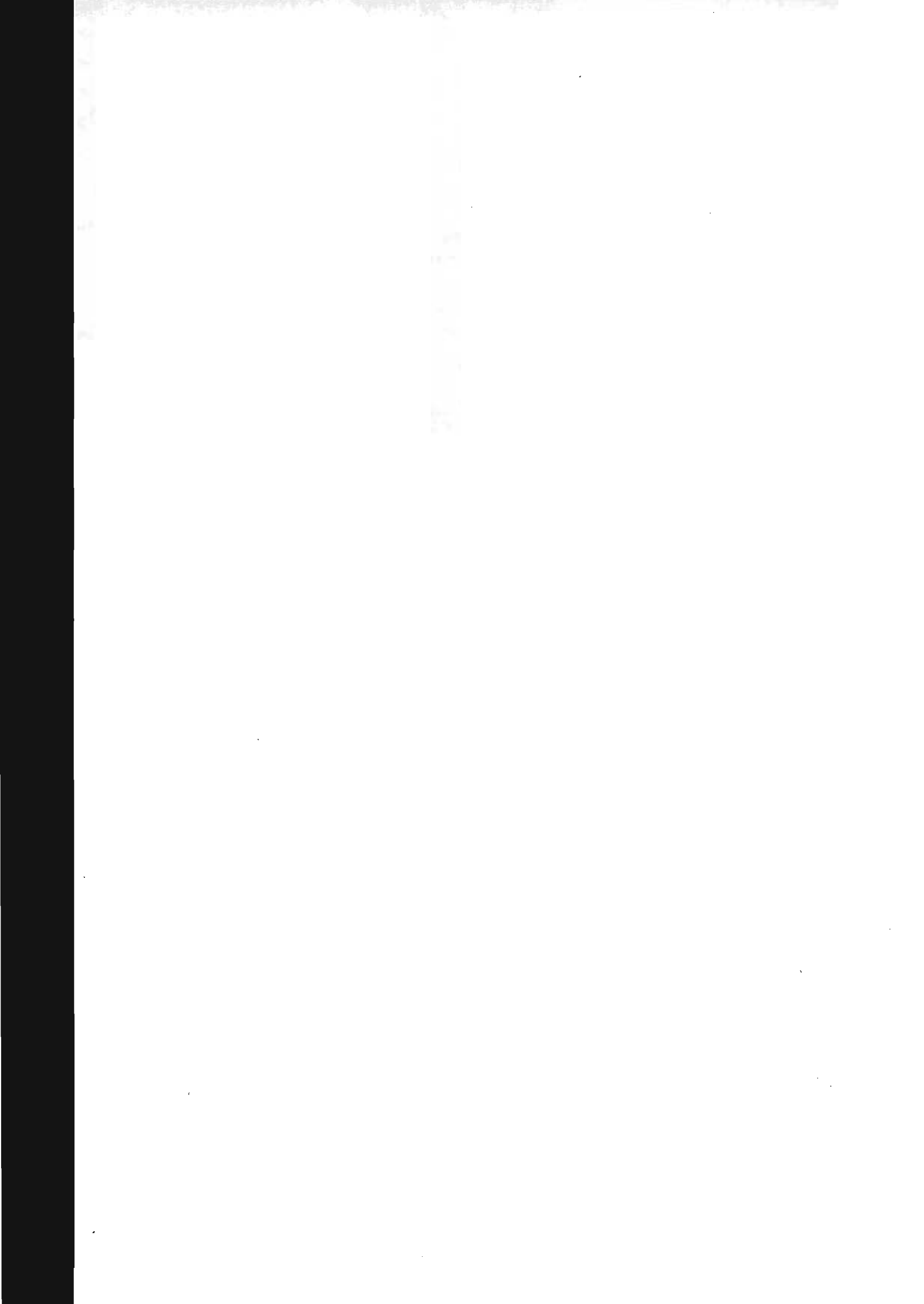
Their Lordships find themselves to be in agreement with the Court of Appeal. It is now well settled, in New Zealand as in England, that an agreement for sale at a valuation is capable of constituting a binding agreement, even if the machinery established by the parties for the ascertainment of the price should for some reason fail. So in *Sudbrook Trading Limited v. Eggleton* [1983] A.C. 444, such an agreement was held to be binding and effective, even though one of the parties failed to appoint a valuer, thereby frustrating the operation of the contractual mechanism for the fixing of the price. The House of Lords held that, on its true construction, the agreement was for a sale at a fair and reasonable price by the application of objective standards; that the contractual mechanism for valuation was subsidiary to the main agreement and that, if for any reason the contractual machinery broke down, the court would substitute its own machinery for the achievement of the parties' contractual intention that a fair and reasonable price be ascertained. So, in the present case, the Court of Appeal held that the Umpire had concluded, as he was entitled to do, that the agreement between Mr. Money and the other shareholders was in substance an agreement that his shares should be sold to them for a fair and reasonable price, to be ascertained by objective standards, and they further held that the agreement as such was a binding agreement.

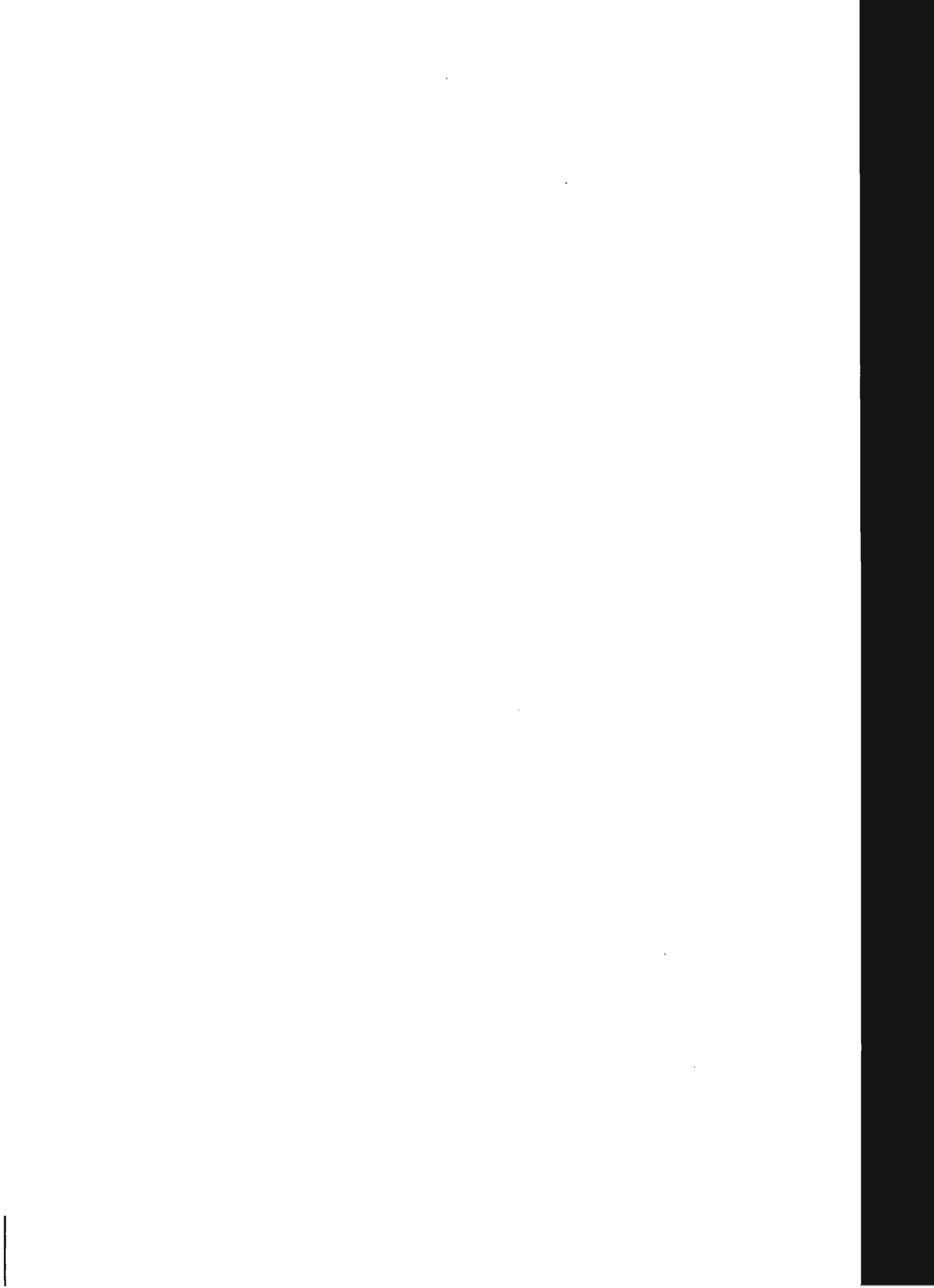
In their Lordships' opinion the Court of Appeal was fully entitled so to read the Umpire's award. Indeed, as Sir Robin Cooke P. indicated, on that basis it was strictly speaking unnecessary for the Umpire to consider whether a term was to be implied in the agreement that disputes between the parties should be referred to arbitration. This is because, given that the agreement of 9th September 1986 was a binding agreement, the date for valuation of the shares was, by that agreement, fixed as 30th June 1986, and so the Umpire was on that basis able to answer the specific question referred to him by the arbitrators. Furthermore, by the consent order of 1st September 1987, the price of the shares was to be determined by

the arbitrators nominated in the order. It follows that, whether or not an arbitration clause was to be implied in the agreement of 9th September 1986, the applicable arbitration procedure was that now agreed between the parties, and embodied in the consent order of 1st September 1987, whereby the price of the shares was to be determined by the arbitrators nominated in the order.

Accordingly, in agreement with the Court of Appeal, their Lordships are unable to discern any error of law on the face of the Umpire's award, vitiating his conclusion that the date for the valuation of the shares was 30th June 1986.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, with the effect that the Umpire's award as to the date for the valuation will stand and the arbitrators can now proceed to determine the price to be paid for the shares on the basis of a valuation as at that date. The appellant must pay the first and second respondents' costs before the Board.





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