Trade Practices Act.

In the present case however His Honour concluded that the narrower wording of the arbitration clause ("arising under this agreement") did not extend to the matters the subject of the dispute which arose prior to the making of the agreement even though they might have involved questions relating to its performance. In the circumstances, he declined to grant a stay of the proceedings.

LEAVE TO APPEAL ARBITRATOR'S AWARD GRANTED – MISCONDUCT

Unreported, Supreme Court of Victoria,
Mr. Justice Nathan, 3 June, 1993
Lindsay Sinclair and Lindsay Sinclair Pty. Ltd. v. Colin and Rosalie Bayly.

Readers will note this judgment was delivered before the Commercial Arbitration (Amendment) Act 1993 (Vic) came into operation.

The case concerned an Arbitrator's Award which was published on 17 January, 1992 in relation to a project type house.

The Plaintiff builder sought leave to appeal against the Award on the following grounds:-

1. That the Arbitrator did not, in the Award, allow the builder interest within the terms of the Building Contract which failure amounted to technical misconduct;
2. That the Arbitrator found that a handwritten note was part of the specification and the way in which the Arbitrator arrived at this finding amounted to procedural unfairness;
3. That the Arbitrator awarded general damages to the proprietors when general damages were not claimed; and
4. That the Arbitrator failed to make appropriate allowances for prime cost items which on the face of the Award should have been allowed.

The Court stated in its judgment that its task of deciding whether or not leave to appeal should be granted was "illuminated" by the decision in *Leighton Contractors Pty. Ltd. v. Kilpatrick Green Pty. Ltd.* (1992) 2 VR 505. In that case, the Full Court of the Supreme Court of Victoria held that the Court's discretion to grant leave to appeal an arbitrator's award was a general discretion the exercise of which was not to be restricted by the application of the Nema guidelines. (The Nema guidelines were set down by the House of Lords in *Pioneer Shipping Ltd. v. BTP Tioxide Ltd.* ("The Nema") (1992) A.C. 724 and required the Court to consider in particular whether there is public utility in allowing leave to appeal because a determination of the question of law involved is of general public importance).

The Court focussed on the issue of the handwritten note being found to

be part of the specification in its judgment, considering that any errors pointed to by the other listed grounds probably arose as a consequence of the error pointed to by ground 2.

The Court found that the handwritten note which the Arbitrator found to be part of the specification was tendered in evidence at the end of the proprietor's case after the note had been called for by the Arbitrator. The builder denied preparing the handwritten note as did the proprietor. The builder's counsel objected to the acceptance of the note in evidence.

The Court held that although the question of whether or not the handwritten note was part of the specification was a finding of fact and not law, the path of coming to the finding of fact was pursued by the Arbitrator in "such an unfair manner that reasonable procedures for rebuttal, argument or further submission were not proffered to either party, and a fortiori to the builder so adversely affected by the facts subsequently found upon it." The Court held that the Arbitrator had misconducted himself within the provisions of section 42 of the Commercial Arbitration Act and the Award ought be set aside. The Court also granted leave to appeal.

The Court found that the Arbitrator should have recalled the parties to be heard on the issue of the relevance of the handwritten note when it became apparent to him, in the course of his preparation of the award, that his decision would rely on the note which was tendered as evidence but objected to by the builder.

His Honour commented that as the whole award was unsound it was in the Court's view inappropriate to remit the matter for further consideration by the same arbitrator.

After the Court delivered the judgment, Counsel were invited to address the Court on a later day as to the appropriate orders to be made pursuant to Section 42, 43 or 44 of the Commercial Arbitration Act.

One of the effects of the Commercial Arbitration (Amendment) Act 1993 is to change the law in Victoria as to when the court may grant leave to appeal from an Arbitrator's award.

Leave will not now be granted unless:-

1. the determination of the question of law could substantially affect the rights of one or more parties to the arbitration agreement; and
2. there is a manifest error of law on the face of the award; or
3. there is strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the commercial law.

If the Court had been required to apply the provisions of the amended Commercial Arbitration Act, it is likely that leave to appeal from the Arbitrators award would not have been granted. The error of law was not manifest on the face of the award, and although there was strong evidence of an error of law, the determination of the question was not likely to add substantially to the commercial law.

The Court' views on the appropriate course to be taken by arbitrators were objected to but untested evidence becomes relevant during the course of preparation of an award remain valuable.

MEREDITH SARGENT

EVIDENCE – REFUSAL BY COURT TO HEAR EVIDENCE CONSIDERED IRRELEVANT HELD NOT TO BE DENIAL OF NATURAL JUSTICE

Federal Court
Lockhart (The Honourable Mr Justice)
(1993) 112 ALR 623
Gamester Pty Ltd and Anor

In arbitrations from time to time, one of the parties appears in person. In practice, this may cause problems for an arbitrator who is loathe to refuse the unrepresented party to adduce evidence or cross-examine upon matters which are clearly irrelevant. Some guidance in dealing with this dilemma is afforded by this case.

The appellant had appeared in person before Lockhart J. in the Federal Court. His Honour held that the application to the Federal Court was vexatious and an abuse of the Court's process and accordingly dismissed the proceedings on this basis. In this judgment he stated:-

> "I stopped further cross-examination of Mr Wheeler as I sought to elucidate from Ms Cameron, as I had indeed with her examination of Mr Fernando, the subject matters that she wished to ask questions about. It was very difficult to obtain any rational account of those matters and at times impossible to do so. but doing the best I could I allowed her to ask questions where it seemed to me to be appropriate. I regret to say they did not show any matter that I regard as relevant to this proceeding or even if it were relevant that would have had any probative value whatever.
>
> The case has reached a point where I will not allow it to go on any longer. To do so would, I think, be a serious erosion of the resources of this court and of the Commonwealth and a waste of everybody's time and money. I have on many occasions throughout the two days sought assistance from Ms Cameron as to what she really wishes to achieve and how she seeks to achieve it; but I have not been helped in that inquiry. I do not suggest that she deliberately refrained from helping me, or refused to help me, but I think she simply has no case whatever on which she can help me".

The matter came before Gaudron J in the High Court who considered whether or not there had been a breach of the rules of natural justice by denying the appellant a reasonable opportunity to remedy a defect in the evidence to be adduced or alternatively to lead argument that there was no such defect. Her Honour concluded that there was not a breach of the