Security for Costs in Arbitration Proceedings

SUPREME COURT

Nathan J.
22nd September, 1986

Mowbray College v. *Exhib Design & Constructions Pty. Ltd. (in liquidation)*

Application for Security for costs in Arbitration Proceedings.

Section 47 of the *Commercial Arbitration Act* 1984 (Vic) ("the Act") provides that:

> "The Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court."

THE FACTS

ON 17th July 1984 Mowbray College ("the College") entered into a building contract with Exhib Design & Construction Pty. Ltd. ("the Builder") for the construction of school buildings. On 22nd March 1985 a variation agreement was entered into between the parties. Pursuant to the variation agreement the College terminated the original building agreement. In response the Builder treated the termination notice as a repudiation of the original building agreement, and served a notice of dispute on 23rd December 1985 to have the matter referred to arbitration.

In the arbitration proceedings the Builder claimed for the value of work and labour supplied under the contract ($201,000.00) and in the alternative on a quantum meruit basis ($348,000.00). The College in turn counterclaimed against the Builder claiming to be entitled to a sum of $90,000.00 by way of liquidated damages.

Upon the Builder's going into liquidation the College made application to the Supreme Court to obtain an order that the Builder provide security for the costs of the arbitration proceedings.

THE COMPANIES (VICTORIA) CODE ("THE CODE")

Section 371(2) of the Code provides that where a company is in liquidation "no action or other civil proceeding" may be commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

Section 533(1) of the Code provides that where a company is a plaintiff "in any action or other legal proceeding" the Court may, if there is reason to believe that the company will not be able to pay the defendant's costs if the defendant is successful in its defence, "require sufficient security to be given for those costs and stay all proceedings until the security is given".

THE DECISION OF NATHAN J.

In the hearing of the application, arguments were raised before Nathan J. as to whether arbitration proceedings fell within the ambit of the phrases "action or other civil proceedings" and "action or other legal proceedings" in Section 371(2) and 533 of the Code respectively.

His Honour gave a broad meaning to the phrases "action" and "legal proceedings" and such meaning, in His Honour's view, should not be constricted by a narrow interpretation of the word "civil". Thus, Nathan J. concluded that the phrases "action" and "proceedings" encompass all "disputes between citizens which affect their legal positions".

In reaching this conclusion His Honour had regard to certain policy considerations. In particular Nathan J. felt that as a liquidator is an officer of the Court, the Court's power to oversee its officers should not be restricted by interpreting the phrase "civil proceedings" so as to exclude arbitration proceedings. Further, the context of the Code suggested to His Honour that Sections 371 and 531 of the Code should apply to all forms of legal disputation involving companies.

In applying Section 371(2) of the Code, His Honour felt that the Courts should start with a pre-disposition in favour of the defendant. In deciding that leave should be granted under Section 371(2), His Honour felt that the Court had power under Section 533(1) to order security for costs.

Further, Nathan J. felt that Section 47 of the Act was wide enough to allow the Courts to make an order for security as to costs, and such a proceeding to obtain security for costs is clearly an "interlocutory proceeding". Such a power, His Honour urged, was necessary in order to expedite the arbitral process, for there is, in His Honour's view, no reason why parties to arbitration should be placed in a less envious position to that of litigants in the ordinary Court process. If there was no power for the Courts to order security for costs, then the risk could be that parties to the arbitral process could use that process free of the constraint of costs in order to either exhaust their opponent or delay proceedings. His Honour went on to state that "such a position is not to be welcomed by this Court and further entrenches my view that Section 47 should be given its plain and literal meaning."

His Honour went on to consider the merits of the case and having weighed all matters, and in particular the weak case of the Builder, ordered that the Builder provide security for the College's costs.

CONCLUSION

It should be borne in mind that Nathan J. may not have reached the same decision if the Builder had not been a Company. In this respect, it is a settled rule of law that the Courts will not make an order for security of costs against an individual litigant merely on the basis that that individual is impoverished. This basis for the court to exercise its discretionary power to order security for costs is only deemed relevant in the case of corporate litigants by virtue of the Code.

However, the decision of Nathan J. is illustrative of the potential width of

operation that Section 47 of the Act may have. For instance, Section 47 could enable a party to arbitration proceedings to apply to the Court for an order to preserve the property which is the subject matter of the proceedings if there is a risk that the other party may dispose of it prior to the completion of arbitration proceedings.

In this respect the Court may be willing, if necessary, to exercise its inherent powers to oversee and administer arbitration proceedings in the same manner as it does for the administration of court proceedings.

Appeal from an Arbitrator's Award

SUPREME COURT OF VICTORIA

Crockett J.
19 May, 1987

Karenlee Nominees Pty. Ltd. and Sheralex Nominees Pty. Ltd. v. *Robert Salzer Constructions Pty. Ltd.*

O'Bryan J.
21st May, 1987

Costain Australia Limited v. *Frederick W. Nielsen Pty. Ltd.*

Appeal from an Arbitrator's Award.

SECTION 38(2) of the Victorian Commercial Arbitration Act 1984 provides for an appeal to the Supreme Court on any question of law arising out of an arbitrator's award. Sub-section (4), however, provides that such an appeal can only be brought by a party to the arbitration agreeement either: —

(a) with the consent of all the other parties to the arbitration agreement; or
(b) subject to Section 40, with the leave of the Supreme Court. (Section 40 deals with exclusion agreements).

Section 38(5)(a) then provides that the Supreme Court: —

> "shall not grant leave under sub-section (4)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement".

These two cases considered the circumstances in which the Court should exercise its discretion to give leave to appeal to it from an arbitrator's award.

In the first of these judgments in point of time, *Karenlee Nominees Pty. Ltd. & Sheralex Nominees Pty. Ltd.* v. *Robert Salzer Constructions Pty. Ltd.*, Crockett J. was faced with differing approaches in the United Kingdom and in Australia. Section 38(5)(a) is in identical terms with Section 1 of the United Kingdom 1979 Act.