# COURT REVIEW OF ARBITRATORS' RULING ON INTERLOCUTORY MATTERS

SUPREME COURT OF SOUTH AUSTRALIA: FULL COURT

30 November, 1990
White, Mohr & Bollen JJ.

*South Australian Superannuation Fund Investment v Leighton Contractors Pty Ltd & Ors*

> "The purpose of the Act is to modernize arbitration as an efficient alternative dispute resolution procedure . . ."
>
> "In my opinion, the 1986 Act contemplates, on the one hand, suitable court intervention at various interlocutory stages of the arbitration proceedings but much more restricted court interference with the arbitrators' final verdict or award".

It appears from the judgments of the Court that:

- the appellant trust and the respondent builder were in dispute over $10 million for work done;
- at the preliminary conference held on 6 March 1990 the arbitrators were asked to accept and "order" a timetable which they did;
- at a second preliminary conference the time for fixing filing and serving Points of Claim was extended. The arbitrators also fixed an extended date (14 May) for filing and serving of any requests for particulars. No such request was made;
- the trust protested to the arbitrators that the Points of Claim contained in six folders were not in proper form and did not adequately disclose the builder's case. There was a hearing before the arbitrators on 25 May. They considered all the arguments offered and later published their reasons for their decision. They said that they would not make the orders sought. They found and declared that the Points of Claim were satisfactory and adequate for the dispute to be heard by them;
- the trust was dissatisfied with the refusal to make the orders sought so it sought from the Court a review of the arbitrators' decision;
- a Master heard and refused the application on the ground of lack of jurisdiction to interfere;
- the trust appealed against the Master's ruling and the matter came on for hearing by the Full Court on 12 November;
- in paras 8, 9 and 10 of the Statement of Claim the trust (plaintiffs in action) pleaded:

> "8. At the preliminary conference heard before the Learned Arbitrators on the 6th day of March 1990 the Learned Arbitrators:
> 8.1 entered upon the reference, and

8.2 ordered, with the consent of both parties, inter alia, that the Builder provide the Plaintiff with Points of Claim by the 17th day of April 1990.

9. By either the Agreement to Arbitrate or alternatively by the Learned Arbitrator's Order given with the consent as referred to in paragraph 8 the Plaintiff and the Builder agreed to be governed inter alia by the ordinary rules of pleadings which apply to an action brought in this Honourable Court and thereby the Points of Claim to be delivered must comply with the Rules and practice of this Honourable Court relating to Statements of Claim.

10. By entering upon the Reference the Learned Arbitrators agreed to conduct the arbitration, inter alia, in accordance with the procedure agreed between the Plaintiff and the Builder."

In para 15 the trust pleaded:

"15. The Plaintiff applied to the Learned Arbitrators for an order that the Learned Arbitrators enforce the agreement and order that the Builder deliver Points of Claim which comply with the agreement referred to in paragraph 9 hereof."

In para 19 the trust suggested that the arbitrators "misconducted themselves".

It was held, inter alia, (by White J, Mohr J concurring, Bollen J dissenting) that upon the proper construction of the Act, the Supreme Court does have jurisdiction to review interlocutory rulings and orders of arbitrators in appropriate cases—this is an appropriate case—the Master should exercise the Court's jurisdiction, inspect the impugned material, hear counsel thereon and, if satisfied that the printed materials do not constitute appropriate points of claim, remit the matter back to the arbitrators for reconsideration of their prior ruling in the light of the Master's findings and of the reasons of the Full Court.

It was held further, that the jurisdiction of the Court is to be found in s. 47 of the Act as aided by s. 43, together with

(i) The legislative intention to elevate and entrench the position of the principles of procedural justice in appropriate arbitration proceedings as evidenced by the definition of "misconduct" to include "a breach of the principles of natural justice" as a ground for removal of arbitrators under s. 44; and

(ii) In long costly complex arbitrations, the undesirability of deferring resolution of questions of law whether or not such breaches had occurred at interlocutory stages until after the hearing and the handing down of the award, outweighs the cost and inconvenience of interlocutory intervention by the Supreme Court, the latter being a lesser evil than the great cost, inconvenience and delay involved in the removal of arbitrators for such breaches or the rehearing of the whole matter after successful appeal against the final award on the ground of such breach(es).

Mohr J agreed with the reasons of White J in this matter. In the opinion of White J, the policy of the Act is clear:

"It is to keep a tight hold upon arbitrators in the course of their pre-trial and trial procedures in those cases where the exigencies of the arbitration call for strict compliance with court rules while leaving arbitrators free to use whatever procedures 'they think fit' in uncomplicated informal arbitrations. The letter and spirit of the Act is such that it allows for such variations in approach to procedures in simple arbitrations while requiring strict compliance with the rules in complex arbitrations."

It is not always easy to decide whether an arbitration falls into the "simple" or into the "complex" category, particularly in the pre-trial stage. One has only to peruse judgments of appellant courts to find that what may have appeared to have been a "simple" matter at the outset finished up as a "complex" matter. It is not beyond the ingenuity or otherwise of lawyers to turn a "simple" matter into a "complex" matter.

In his dissenting judgment, Bollen J said:

> "Nor can I find any warrant for the suggestion that the Points of Claim should be in the form of a Statement of Claim in this Court and, therefore, drawn in accordance with the Rules of Court. No authority supporting this proposition was cited. The parties have not agreed it in terms. Nor can the setting of the timetable and the ordering of Points of Claim impliedly create agreement or produce an order that the Points of Claim should be in the form of a Statement of Claim in this Court. In the very nature of things Points of Claim in arbitrations will often differ in form from the form of a Statement of Claim drawn in accordance with the Rules of Court."

With respect, Bollen J's views seem to accord with the rights of the parties to an arbitration to have the dispute decided by a tribunal of their choice according to a procedure of their choice. As pointed out by Mustill & Boyd in Commercial Arbitration 2nd Edition at page 540 in an "action, a succession of procedural steps are laid down by the Rules of Court which must be followed, and promptly followed, if one or other party is not to find himself in default; and upon the occurrence of such a default, the Court has punitive powers, most of which are themselves laid down by the Rules. In an arbitration, there are no rules, except for those which are expressed in the arbitration agreement, or some specific procedural agreement between the parties" (and of course any Rules brought into existence pursuant to a section of the Act).

In regard to s. 47, White J said:

> "Since any question that arises for determination in the course of proceedings (s. 22(1)) shall be determined (in the absence of agreement, s. 22(2)) according to law and since any breach of procedural justice is a ground for removal, the greatest care must be taken by arbitrators about questions like the present one—the formulation of a complex claim. It might be said that that fact in itself does not give the court supervisory jurisdiction when arbitrators fail to do so. The answer to that argument, it seems to me, lies in the express terms of s. 47 and the absence of any work for s. 47 to do other than the work which I suggest for it, namely, the work of authorising the court to make interlocutory orders where arbitrators 'run off the procedural rails' ".

With respect, it is suggested there is another approach. There is potential work for s. 47 to do. For example, in appropriate circumstances, the Court can: order security for costs; grant an injunction, including a Mareva injunction; make an Anton Pillar order; order inspection of property and make any other interlocutory order that the Court has power to make for the purposes of and in relation to proceedings in the Court and which an arbitrator can have no power to make. Where an arbitrator "runs off the procedural rails", it is suggested that an application for his removal under s. 44 may be appropriate. Also it seems that the Court has no inherent jurisdiction to supervise arbitration proceedings (see *The Arbitrator*, Vol. 6, No. 2, August 1987, p. 50).

White J connected ss. 47 and 43 of the Act. He said:

> "The court would in virtually all review 'corrections', be likely to send the matter back to the same arbitrator with a direction under s. 43 to reconsider the ruling in the light of the court's reasons."

Bollen J said:

> "But I think, as did the Master, that s. 43 applies only when an award has been made."

It appears that ss. 38(3) and 43 of the Act had their genesis in s. 10 of the (UK) *Arbitration Act*, 1889. That section was reflected in all the old Acts in Australia. In South Australia, it was s. 8 of the 1891-1974 Act. It applied only when an award had been made. When Part V of the Act is read down, it would seem that s. 43 only applies when an award has been made. If that be so, the Court has no power under s. 43 to remit anything to the arbitrator before award. This seems to conform with common sense. If the Court had such a power and, for example, ordered an arbitrator to direct the Claimant to file and serve proper Points of Claim, how can the arbitrator enforce the direction if the Claimant disobeys it. The arbitrator does not have the coercive powers which belong only to the Court. It is suggested that the correct approach in such situations is that adopted by Brownie J in *New South Wales Land and Housing Corporation* v *P and E Phontos Pty Limited* 19 October 1989 where the Court ordered the arbitration proceedings be adjourned until further order of the Court whilst the Court resolved the matter in dispute. In reality the Respondent Corporation invited the Court to intervene to supplement a gap in the arbitrators' powers. The Court made a procedural order that the Defendant (Claimant) provide the Plaintiff with the particulars requested by it. Thus the Court was then in the position, in the event of non compliance with its order, to enforce its will by exercising its inherent jurisdiction to stay or dismiss the action, to strike out the whole or parts of a pleading, or to penalise in costs or, in extreme cases, the exercise of the remedies for contempt of Court. (Note: The jurisdiction of the Court to make the procedural order was made purportedly pursuant to s. 47 of the Act there being "no objection raised as to that". It is suggested with respect that the jurisdiction which could have been invoked was that given by s. 18.

It seemed to White J that "if an early ruling by the arbitrators threatens to deny one party a reasonable chance first, to understand what might be a 'sloppy' presentation of an ill-conceived large claim and, second, to frame its defence and evidence in a meaningful way . . . the arbitrators are in breach of procedural justice in their ruling and liable to removal. However, the trust does not want to remove them." Bollen J could not accept the suggestion that the arbitrators "misconducted themselves".

Had the matter proceeded along the lines of *Phontos* (above), there could have been no suggestion that the arbitrators "misconducted themselves".

It may be thought that this judgment is not binding on other jurisdictions in Australia and hence may not be followed. White J seems to suggest that it is a radical departure from legislative policy and arbitration practice and it

may not be favoured elsewhere (p. 12). Whilst it may not be favoured, that is not to say that it will not be followed elsewhere in Australia. At present it is at least arguable that, as the Act is "uniform" in all Australian jurisdictions, *R* v *Abbrederis* (1981) NSWLR 530 applies.

Street, C.J. said at 542:

> "But I have not the slightest doubt that, where a common law statute has been construed by the ultimate appellate court within any state or territory, that construction should, as a matter of ordinary practice be accepted and applied by the courts of other states and territories so long as it is permitted to stand unchanged either by the court of origin or by the High Court. The risk of differing interpretations amongst the states is thus negated and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured."

(Also see *Leighton Contractors Pty Ltd* v *Kilpatrick Green Pty Ltd*, Supreme Court of Victoria, Southwell J, 11 April 1990).

The question arises as to what can arbitrators do in circumstances such as existed in this matter to shield themselves from allegations of misconduct.

It is suggested there are potentially useful provisions in s. 18 of the Act in this regard: S. 18(1)(c) provides:

> "(1) Unless a contrary intention is expressed in an arbitration agreement, where a person (whether or not a party to the agreement) . . .
>
> (c) refuses or fails to do any other thing which the arbitrator or umpire may require,
>
> a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may order the person so in default to attend before the Court for examination or to produce to the Court the relevant document or to do the relevant thing."

In hindsight, and in the facts and circumstances of this case, if the arbitrators, after hearing submissions, had any shadow of doubt that the Points of Claim were not properly pleaded, they could have directed the Claimant to file and serve proper Points of Claim within a definite reasonable time and, at the same time, inform the parties that in the event of default they would hear submissions on whether there should be an application to the Court pursuant to s. 18 of the Act for an order that the Claimant file and serve proper Points of Claim. Should this procedure not produce the desired result, and should the Respondent be still aggrieved, the arbitrators could then fix a definite reasonable time for the Respondent to make such an application to the Court should that be his desire. Should the Respondent use the ploy of saying that he did not wish to make an application to the Court of that time but wished to reserve his rights in that regard, the arbitrators could then remind the parties that the arbitrators do have a discretion themselves to make the application to the Court. Frequently parties then back away from stances previously taken.) When such a procedure is followed, arbitrators are likely to be safe from allegations of misconduct.

J.A. MORRISEY