

APPEAL OF ARBITRATORS AWARD REFUSED - SECTION 38(5) COMMERCIAL ARBITRATION ACT

New South Wales Court of Appeal,
(Clarke and Sheller JJA and Samuels AJA, Unreported,
11 September, 1992)

Vandervaere & Anor v Milan & Anor

These proceedings concerned an arbitration arising out of an agreement to construct additions to a dwelling house. There were various claims and cross-claims. The owners were awarded the sum of \$8,031 and the builder was awarded the sum of \$6,837 giving a nett sum payable to the owners of \$1,194. The arbitrator awarded the owners interest upon the sum of \$1,194 and costs of the proceedings but did not award the builder interest on a progress claim of \$6,000 he allowed to the builder which was included in the sum of \$6,837. The building contract between the parties provided for interest on overdue progress payments. It is significant that the builder had not claimed interest in its pleadings.

The Court had to consider the application of Section 38(5) of the New South Wales Commercial Arbitration Act 1984 as amended which read:-

“(5) The Supreme Court shall not grant leave under subs (4) (b) unless it considers that:-

- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
- (b) there is:
 - (i) a manifest-error of law on the face of the award; or
 - (ii) 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 certainty of commercial law.”

As Clarke JA who delivered the leading judgment stated “. . . the purpose behind the sub-section was to reduce the ambit of judicial supervision and review of arbitral awards”. His Honour was prepared to assume that sub-section (a) had been satisfied. With respect to sub-section (b) (i), it was His Honour’s view that failure by the arbitrator to deal in his award with a matter which had not been raised in the pleadings could hardly be regarded as coming under sub-section (b) (i).

Likewise, His Honour took the view that sub-section (b) (ii) was not applicable since it was not possible to discern either an error or strong evidence of an error from the terms of the award itself. In any event, in His Honour’s view, even if there were strong evidence of an error of law, His Honour thought that the determination of the question would not add substantially to the certainty of commercial law.

In the circumstances, the Court of Appeal upheld the arbitrator’s decision.