

MISCONDUCT ARISING OUT OF ARBITRATORS PRIOR KNOWLEDGE OF ONE OF THE PARTIES

Appeal to Full Court of the Supreme Court of Western Australia
FUL 72 of 1993

Vale v. The Official in Bankruptcy as Trustee of The Bankrupt Estate of YUSUF DE TOIT and MANDIC.

The decision at first instance was an unreported decision of Scott J dated 1st April 1993. (see "The Arbitrator" Vol. 12, 1993 at page 80)

This case note discusses the outcome of the Appeal from that decision and provide comment on the merits of the decision at first instance and on the resolution of the Appeal by consent.

The Appellant had been the arbitrator in a dispute between Mr du Toit, whose place in the Appeal proceedings was taken by the official Trustee in Bankruptcy, and the second Respondent. The Appellant arbitrator in his award had found in favour of the second Respondent.

In the proceedings at first instance in the Supreme Court before Justice Scott, Mr du Toit as Plaintiff in those proceedings sought to set aside the Arbitrator's Award.

The Appellant had been a member of the Builder's Registration Board which had suspended Mr du Toit as a registered builder in 1989 for the period of one year. Justice Scott at first instance held that the arbitrator had a duty to disclose to the other parties the fact that he had prior knowledge of the Plaintiff. His Honour then went on to set aside the arbitrator's award on the ground of misconduct as that term is defined in the Commercial Arbitration Act, 1985.

The relevant principles were those stated in *Livesey v. The NSW Bar Association* (1983) 151 CLR 288, known as the "fair-minded observer" test for bias. Justice Scott concluded that a fair-minded observer would entertain a reasonable apprehension that the arbitrator might not bring an impartial and unprejudiced mind to the matter.

The second ground on which it was sought to set aside the arbitrator's award was that of unintelligibility and uncertainty of the award.

The Plaintiff's claims in this regard were that:

1. The Award was uncertain because the Arbitrator had not made a finding on the issue of repudiation, which was central to the dispute between the parties. Justice Scott set this claim aside as it was implicit in the terms of the Award that the Arbitrator had found that the Plaintiff had repudiated the contract.
2. The Arbitrator had allowed sums in excess of those claimed. Justice Scott said that this did make the Award uncertain or unintelligible.

Justice Scott at first instance made three orders in relation to costs:

1. That the arbitrator should refund the fees paid to him for the arbitration;
2. That the arbitrator should pay the Second Respondent's cost of the arbitration, but not the costs of Mr du Toit, the Plaintiff;

3. That the arbitrator should pay the Second Respondent's costs of the Supreme Court action and half of the Plaintiff's costs of the Supreme Court action.

The Appeal to the full court of the Supreme Court of Western Australia was limited to the issue of costs. The Appeal was resolved by a Consent Order dated the 6th of December, 1993. By consent, it was resolved that the orders at first instance requiring the arbitrator to pay the second Respondent's costs of Supreme Court action and half of the Plaintiff's costs of the Supreme Court action be set aside. There was to be no order as to costs in relation to the Appeal.

The final outcome of this matter, therefore, was that the arbitrator was required to refund his fees and to also pay the second Respondent's cost of the arbitration.

COMMENTS ON THE DECISION AT FIRST INSTANCE AND THE APPEAL

Despite the fact that the resolution of the Appeal by consent resulted in a less onerous outcome for arbitrator, the decision at first instance still stands as a precedent on these issues. The merits of that decision are still therefore of considerable importance.

Justice Scott's decision in relation to costs seems to have been quite strongly influenced by the fact that the arbitrator took an active role in the proceedings. The unusual nature of that active role was considered by Counsel for the Appellant, who in argument set out the reasons for that situation having come about, those reasons being as follows:

1. The arbitrator had been joined as a party to the proceedings;
2. From the beginning, the application not only sought the setting aside of the arbitrator's award, but also the paying of the costs of the arbitration and of the Supreme Court proceedings by the arbitrator;
3. The Plaintiff claimed that the first Respondent had deliberately concealed his prior involvement of the Plaintiff in the course of a conversation, in respect of which it was necessary for the arbitrator to give evidence;
4. It was not clear what the attitude of the second Respondent would be on the question of costs of the arbitration and it was therefore necessary for the arbitrator to be able to put his own argument in relation to that issue.

Due to the Plaintiff's application, the arbitrator would have been liable for costs whether or not he chose to appear at the Supreme Court proceedings and his decision to take an active role in the litigation therefore appears justified. Also, the allegation of deliberate concealment on the part of the arbitrator is a serious one and one that required detailed argument as well as the leading of evidence by the arbitrator himself.

Unfortunately, in his judgement at first instance, Justice Scott did not consider the merits of these arguments and simply stressed the unusualness of the arbitrator taking an active role in the litigation.

Justice Scott's decision is also curious in that although both the arbitrator and the second Respondent sought to uphold the arbitrator's

award and to oppose the Plaintiff's application, it was held that the arbitrator would fully pay the second Respondent's costs of the Supreme Court proceedings. As stated above, the orders in relation to the costs of the Supreme Court proceedings were set aside under the Consent order that resolved the Appeal.

The fact that both the first Respondent and the second Respondents to the Appeal gave their consent to the setting aside of the costs orders can give rise to a presumption of their view of the strength of the decision at first instance. Nevertheless, that decision was unfortunately not tested before the Full Court.

CONCLUSION

As noted previously, the effect of the decision of first instance as a precedent is not removed by the resolution of the Appeal by consent in this particular case.

There are, therefore, considerable dangers for arbitrators created by Justice Scott's decision. An arbitrator whose award is set aside for misconduct under the Commercial Arbitration Act 1985 arising from his/her prior knowledge of one of the parties may be required to:

1. Refund fees paid to him/her for the conduct of the arbitration;
2. Pay the costs of the arbitration of any party to that arbitration who had no knowledge of the arbitrator's prior involvement;
3. Potentially pay the total costs of all other parties of any application to set aside the award.

These potentially onerous results illustrate the magnitude of danger for an arbitrator who continues in that role if he/she has any feeling that they may have had some prior involvement with one of the parties to the arbitration. If an arbitrator forms such a view, he/she should immediately inform the parties and their representatives and, if necessary, undertake enquiries to ascertain the exact nature of his/her prior involvement with the relevant party.

L.E. JAMES

TAXATION OF COSTS – FEES CHARGED BY NON LEGAL REPRESENTATIVE HELD TO BE NOT RECOVERABLE

The Full Court of the Supreme Court of Western Australia
(Pidgeon, Wallwork, Rowland JJ.)

Judgment delivered 29 April 1994

James Aris & Associates v The Minister For Works

THE FACTS

The Minister and Aris entered into a contract for the design, documentation and administration of a building contract. When a dispute arose in relation to Aris' fees, and the dispute was submitted to arbitration, the arbitrator gave leave, pursuant to Section 20(1) of the *Commercial Arbitration Act* of 1985 ("the Act") for Aris to be represented by D, who was