APPLICATION TO REMOVE ARBITRATOR SEC. 32

Supreme Court of Queensland
Kiefel 1 – unreported 23 December, 1993
Kennedy Taylor (Qld) Pty Ltd v Civil & Civic Pty Ltd

The claimant sought orders removing the arbitrator and setting aside an interim order under s.32 of the *Arbitration Act* 1973, which governed the arbitration. The complaint made against the arbitrator included a failure to act impartially, receiving private communications from the other party, and acting upon them without affording the other party the opportunity to be heard, conduct a proceedings such as to give reasonable implication of incompetence, failing to exercise discretion judicially, misconceiving the parties' submissions, misleading the claimant as to the nature of the hearing which led to the interim award, and making errors of law evident on the face of the award.

As a preliminary issue in the arbitration, the issue of the operation of a "time bar" in the governing contract was raised by the parties, and it was agreed that this issue may be raised in a separate preliminary conference, and the arbitrator may seek his own legal advice in respect of it, if requested by the parties.

MISCONDUCT

His Honour had already considered s.32 of the 1973 Act which provided that the Court may remove an arbitrator and set aside an award where it is satisfied that there has been misconduct on the part of the arbitrator himself, or in the conduct of the proceedings.

The term "misconduct" was accordingly construed to include both personal impropriety as well as "procedural mishaps", at least where they had resulted in the rights of the parties being affected.

The first species of misconduct alleged by the applicant against the arbitrator was by an instance of impartiality. The principal allegation was that the arbitrator received a written communication from one of the parties whilst not affording the applicants an opportunity to make representations.

His Honour considered each of the alleged communications and considered that in no instance did either the substance or the matter of the communication give rise to a perceived actual partiality, or that a reasonable person would gain that impression. His Honour considered that whilst the communication may be, technically, a breach, the communication raised no occasion such that it could be said that the applicant must or ought to be heard upon it. Of more significance, however, was that His Honour appeared to be persuaded by the view that a failure to object to the alleged misconduct in a timely way can result in a party being treated as having waived a right to appeal against the resulting

adverse decision. The view that an individual litigant might be regarded as having lost that right did not seem to His Honour to be at odds with the public interest which is involved in the question of observable bias. In conclusion His Honour considered that by reason for the applicant's failure to raise any objection throughout the whole of the arbitration, it lost the right to subsequently make such an assertion.

The second species of alleged misconduct pleaded by the applicant was that the arbitrator had been incompetent, in that he made many errors which, although by themselves did not amount to misconduct, taken together, showed that he had not understood what he was doing.

From this point, His Honour rejected these submissions and determined that many of the complaints particularised were not attributable to any lack of competence but, rather, were complaints that the arbitrator ought not to have followed the particular course that he did.

The conduct of the proceedings was a matter for the arbitrator and His Honour did not consider that it should be said that an arbitrator would necessarily be wrong to proceed to an interim determination as he did in this case, where he was of the view that it might shorten the proceedings or at least bring the matter to a head.

Most importantly, in determining whether the alleged mistakes and misunderstandings of the arbitrator when taken together constituted incompetence, His Honour expressed a reluctance to follow such an exercise. Further, he indicated that such an approach does not deal with the more significant question, which is whether any likely prejudice has been suffered such that there has been a miscarriage of the arbitration.

ELIZABETH SOLOMON

ARBITRATION – APPEAL AGAINST AWARD

In the November 1994 issue of "The Arbitrator" (Vol. 13 No. 3) at page 163 a case note was published under the heading "Arbitration – Appeal Against Award – Whether "Manifest Error" of Law on Face of Award – Relevant Principles Explained". It is regretted that the Case Note omitted to identify the case *Natoli v. Walker*

EDITOR