Enterra Pty Ltd & ORS v ADI LTD [2002] NSWSC 700

Bill Morrissey[1] *and Greg Hinchy*[2]

Einstein J in the Equity Division of the Supreme Court of New South Wales recently discussed when an arbitrator may be removed on the grounds of '*unsuitability*', pursuant to s44 of the *Commercial Arbitration Act (1984) (New South Wales)* ('Act').

Section 44 of the Act relevantly provides:

> *'Where the Court is satisfied that:*
> *(a) there has been misconduct on the part of an arbitrator or umpire has misconducted the proceedings;*
> *(b) undue influence has been exercised in relation to an arbitrator or umpire; or*
> *(c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute,*
> *the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.'*

The case dealt with delay in the commencement of an arbitration hearing. Cole QC was originally appointed as arbitrator; however, he was replaced with the parties' consent when appointed a Royal Commissioner. The hearing dates had to be vacated as a result of the parties not meeting the deadlines which had been set in previous directions hearings. Brownie QC who was appointed arbitrator, was however unable to fix a hearing date due to his other commitments. An application was made by the Plaintiff to remove Brownie QC on the ground of misconduct.

Einstein J considered the issue of the meaning of 'unsuitability', by referring to the leading analysis of Brooking J in *Korin v McInnes*.[3] In that decision, Brooking J said that:

'It seems to me that the test to be applied under paragraph (c) is the same as that which would be applied on an application under the section formerly in force or on an application for an injunction to restrain an arbitrator from acting where incompetence or unsuitability was set up … Can the arbitrator properly perform his functions, so that a satisfactory arbitration can be had? … Of course it is for the applicant to prove that he cannot.'

Einstein J also referred to the earlier decision of Brooking J in *Stannard v Spurway Constructions*[4] where His Honour held:

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1 Bill Morrissey is a partner in McCullough Robertson's Construction Industry Group.

2 Greg Hinchy is a solicitor in McCullough Robertson's Construction Industry Group.

3 [1990] VR723 at 727.

4 [1990] VR673 at 678-679.

'unsuitability in its widest sense may arise from innumerable causes … And, like incompetence, it is a matter of degree … Paragraph (c) is concerned with unsuitability "to deal with the particular dispute" and those words have a limiting effect.'

The defendant's position was that as a matter of construction 'unsuitability' required something more than delay in the hearing and that the plaintiff must show, consistently with the judgments of Brooking J, that a satisfactory arbitration could not be had. The defendant said that:

'If the power to remove an arbitrator for unsuitability was enlivened merely because a party, having sought and obtained the vacation of the hearing dates, subsequently altered its view and then seeks to have the arbitration proceed but on dates not convenient to the arbitrator, then the "line" drawn by the section would be far too low a threshold … It would, be respectfully submitted, be an open invitation to parties to arbitration agreements to apply to the court for removal of an arbitrator for merely tactical or forensic purposes.'

The plaintiff on the other hand argued that the word '*unsuitable*' was a word of wide import and that its meaning should not be unduly circumscribed. The plaintiff also submitted that Brooking J was in error when he construed the terms used by s44(c) by reference to the different terms which were found in a former section.

Einstein J held that it did not seem that the construction of the section requiring the circumstances to be such that a satisfactory arbitration could not be had amounted to an unduly narrow interpretation.

It was held that the Plaintiff did not establish that Mr Brownie was unsuitable within the meaning of section 44(c) to deal with the particular dispute. It had not been shown that a satisfactory arbitration could not be had, nor that the arbitrator was not able to properly perform his functions. No question of Mr Brownie's competence, experience or capacity to deal with the particular dispute of the arbitration had been suggested. Rather, the issues at hand were of availability, dates, counsel's convenience and forensic tactics.

His Honour said that it was possible that the occurrence of a number of events which post-dated the appointment of an arbitrator, including unavailability to hear the dispute on or before a particular date or within a particular bracket of time, *may* constitute an arbitrator being unsuitable within the meaning of the subsection to deal with the particular dispute. Whether or not a particular circumstance fell into that capacity, the onus is on the party seeking to establish that the date difficulties make the arbitrator unsuitable.

His Honour held that given Mr Brownie could only commence the hearing after a number of months, this did not mean that he became unsuitable to deal with a particular dispute. Any suggestion that Mr Brownie was not available for a number of years might enliven the notion that he had, for that reason, become unsuitable to deal with the particular dispute; however, this was not the case.

His Honour also noted that it was an important consideration that as the arbitrator was appointed by consensus of all parties, the Court would not interfere with such selection which was the '*linchpin which underpins the arbitral procedure going forward*'.