

# Gunns Forest Products Ltd v North Insurances Pty Ltd and Others

[2004] VSC 155

Bill Morrissey<sup>1</sup> / Sarah Connell<sup>2</sup>

The Plaintiff applied for leave to appeal pursuant to section 38 of the *Commercial Arbitration Act 1984* against an award of an arbitrator. By the award, which was handed down on 19 December 2003, the arbitrator determined that the loss of a large quantity of wood chips was not one which was covered by an 'Industrial Special Risks' policy of insurance.

## Section 38

His Honour emphasised that those who choose to resolve disputes by arbitration must 'take the good with the bad'. They choose the advantages of speed and cost that come with alternative dispute resolution, but also more limited rights of recourse to the courts thereafter. Section 38 limits those rights of appeal. Section 38(1) states that without prejudice to the right of appeal set out elsewhere in the section, the court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award. By virtue of section 38(2), an appeal lies to the court on any question of law arising out of an award brought with the leave of the court. That leave shall not be granted unless, but shall be granted if, the court considers that each of two conditions precedent exist:

1. Having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and
2. There is either:
  - (a) a manifest error of law on the face of the award; or
  - (b) strong evidence that the arbitrator 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.

The Plaintiff submitted that the award contained a manifest error on its face. His Honour referred to the judgement of Sheller JA in *Promenade Investments Pty Ltd v State of New South Wales*,<sup>3</sup> where Sheller JA states that before leave is granted there should be 'powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law'. It was not sufficient for the Plaintiff to demonstrate that the correctness of the award is open to some doubt, or that the arbitrators favoured construction of an insurance policy is only one of several, each of which is fairly arguable.

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3. [2003] VSC 275.

## The policy

The Plaintiff was the insured and the first Defendant the insurer, under an 'industrial special risks' policy of insurance. Industrial special risks insurance is designed to cover the insured against loss of gross profit and increased costs of working or production flowing from physical damage to the insured property. In this case, that property included the Plaintiff's wood chips. A quantity of wood chips was found to contain flakes and scallops of rubber and the underwriters accordingly accepted liability, but with a qualification which brought the parties to the arbitrator. The underwriters contended that there was a relevant exclusion clause. The arbitrator found that the exclusion clause applied to exclude the insured's claim.

The relevant clause was included in the part of the policy which was headed 'Perils Exclusions'. It provided that, in circumstances such as those which apply in this case, the insurer shall not be liable 'in respect of ... physical loss, destruction or damage occasioned by ... contamination ... unless such ... results from a cause not specifically excluded which originates beyond the premises ... of the insured'. Physical loss, destruction or damage occasioned by a number of things including wear and tear and faulty materials or faulty workmanship were likewise excluded. The exclusion clause was limited to the extent that it did not apply to 'subsequent loss, destruction of or damage to the property insured occasioned by a peril'.

## The arbitrator's findings

The arbitrator found that the damage constituted contamination within the terms of the exclusion clause. The introduction of pieces of rubber into the woodchips resulted in the mixture of the two, so that they could not conveniently be separated. The woodchips were therefore unmerchantable.

### Plaintiff's submissions

The Plaintiff submitted that there was a manifest error of law on the face of the award in that the damage did not fall within the scope of the perils exclusion. The plaintiff made the following submissions:

- (a) The reference to 'physical loss, destruction or damage' in the policy refers to the physical harm to the property, not the financial consequences of that harm;
- (b) The policy did not exclude physical damage where the damage itself was contamination, it excluded damage 'occasioned by or happening through contamination'; and
- (c) The arbitrator made a manifest error in that he did not examine, as he was bound to do, the cause of the damage.

### **Manifest error of law**

Justice Harper considered the submissions made by the Plaintiff in light of the relevant authority and concluded that while the phrase 'occasioned by or happening through' requires consideration of causal concepts, it does not follow that the reasoning adopted by the Plaintiff was correct. It was held that the distinction drawn between damage constituting contamination and damage occasioned thereby was not the proper reasoning to adopt. While it was agreed that the award was not particularly clear in stating that the arbitrator examined the cause of the damage, it was held that a fair reading of the award as a whole and in context left no doubt that that issue was taken squarely into account.

Justice Harper held that it was clear from the award that the arbitrator concluded that the damage to the woodchips was occasioned by their contamination and that the damage was not the contamination itself. On that basis, there was no need for the arbitrator to further consider issues of causation. It was held that the arbitrator was not manifestly wrong in adopting that approach. Further, where the arbitrator's award is not on its face affected by a manifest error of law, and where there is no strong evidence that the arbitrator made such an error, leave cannot be granted under the Act. Accordingly, the appeal was refused with costs.

