CASE NOTES
Preliminary Questions of Law

SUPREME COURT OF VICTORIA

OFFER OF COMPROMISE

Gobbo J.
31 May, 1988

Mideco Manufacturing Pty. Ltd. v. William Morris Tait (Trading as TAIT Engineering)

This was an application pursuant to Section 39 of the Commercial Arbitration Act 1984 to have the Court determine a question of law arising during the course of an arbitration.

There had been an arbitration that had sat some 27 days. The arbitrator had made an interim award of $33,092.,63. Prior to the hearing an offer of $45,000.00 had been made.

The court considered the following:—

(i) its jurisdiction to determine preliminary questions of law;
(ii) whether Order 26 of the Supreme Court Rules was applicable to arbitrations;
(iii) whether the offer before the court constituted an Offer of Compromise within the meaning of Order 26; and
(iv) if it was not an Offer of Compromise whether the offer was nevertheless admissable on the question of costs.

JURISDICTION

His Honour first dealt with the question of jurisdiction. His Honour turned to Section 39(2) of the Act which provides:—

"(2) The Supreme Court shall not entertain an application under sub-section (1)(a) with respect to any question of law unless it is satisfied that:
(a) the determination of the application might produce substantial savings in costs to the parties; and
(b) the question of law is one in respect of which leave to appeal would be likely to be granted under Section 38(4)(b)."

His Honour decided that he had jurisdiction to determine the issues raised by the parties. His Honour was satisfied that even in circumstances such as these, after an interim award had been brought down by an arbitrator, the determination of the application might produce substantial

savings in costs to the parties. His Honour was of the view that the judicial interpretation of an issue not the subject of any previous review by the court may well save the parties to the arbitration the costs of a further hearing, reduce the time taken by the arbitrator to deliberate and may prevent the likelihood of one party appealing the decision of the arbitrator.

In deciding whether the second limb of Section 39(2)(b) was satisfied, namely, whether the question to be determined was one in respect of which the court would be likely to give leave to appeal, His Honour had recourse to Section 38(5)(a) of the Act. This provides that the Supreme Court is not to grant leave under sub-section (4)(b) "unless it considers that, 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 of the Arbitration Agreement". His Honour was satisfied that, in accordance with Section 38(4)(b), the determination of the question of law concerned could substantially affect the rights of one or more of the parties. In particular His Honour drew attention to the costs of the hearing that had lasted 27 days. He considered the issue of costs was an important aspect of the arbitration agreement and within the ambit of Section 38(4)(b).

In addition His Honour noted that the arbitrator himself had joined in the request for a determination by the Court.

His Honour distinguised *Babanaft International*—v—*Avant Petroleum Inc.*—*The Oltenia* [1982] 3 All E.R. 244 and considered that the application would not bring about any lengthy interruption of the arbitration proceedings on foot.

ORDER 26—APPLICABLE TO ARBITRATIONS?

His Honour was of the view that as a result of Section 34(5A) of the Act, Order 26 is capable of applying to arbitration proceedings.
Section 34(5A) provides

> "Where in accordance with rules of court an offer of compromise has been made in relation to a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by sub-section (1), take into account both the fact that the offer was made and the terms of the offer".

Order 26 provides, so far as relevant:—

.....

26.02

(1) .....

(2) .....

(3) For the purpose of this Part an offer of compromise shall—

(a) be in writing and be prepared in accordance with Rules 27.02 to 27.04; and
(b) contain a statement to the effect that it is served in accordance with this Part.

26.03

(1) An offer of compromise may be served at any time before verdict or judgment in respect of the claim to which it relates.

(2) a party may serve more than one offer of compromise;
(3) an offer of compromise may be expressed to be limited as to the time the offer is open to be accepted after service on the party to whom it is made, but the time expressed shall not be less than 14 days after such service.
(4) A party on whom an offer of compromise is served may accept the offer by serving notice of acceptance in writing on the party who made the offer before—

(a) the expiration of the time specified in accordance with paragraph (3) or, if no time is specified, the expiration of 14 days after service of the offer; or
(b) verdict or judgment in respect of the claim to which the offer relates—whichever event is the sooner.

(5) .....

(6) .....

(7) Upon the acceptance of an offer of compromise in accordance with paragraph (4), unless the Court otherwise orders, the Defendant shall pay the costs of the Plaintiff in respect of the claim up to and including the date the offer was served.

The effect of an offer to compromise on the question of costs is generally similar to that of a payment into Court under the former rules.

His Honour made the initial observations that Section 34(5A) of the Act came into force on the same day as Order 26 was first introduced in the Supreme Court Rules and, in addition, at the same time as the

new Supreme Court Rules came into force the power in Section 61 of the Act to make rules as to the conduct of arbitrations was removed.

The applicant argued that the wording of Rule 1.05(1) of Chapter 1 of the Rules of the Supreme Court made it clear that the Rules applied only to civil proceedings in the Court and thus could not apply to arbitrations. His Honour rejected this comment stating:

> "The Act overrides the Rules. This statutory direction is peculiar to offers of compromise, so it cannot be said that this view means that other Rules in chapter 1 become applicable. It is true that the verbiage of Rule 26 is such that it is difficult to apply to arbitration. No doubt rules may be made by the Court to deal specifically with arbitrations, or specifically referring to the applicability of some portions of those Rules. But that does not mean that Section 34(5A) is to be treated as having no capacity to bring existing Rules as to offers of compromise into operation with such modifications as are appropriate."

THE OFFER IN QUESTION

His Honour then considered whether the particular letter in question amounted to an Offer of Compromise within Order 26.

The particular offer and its rejection were expressed as follows:—

> "We refer to previous correspondence and advise that we are now instructed by our client, Mideco Manufacturing Pty. Ltd., to make an offer of compromise on the basis that our client offers to your client the sum of $45,000.00 together with costs and disbursements claimable on a party/party basis, with a denial of liability, and say that the said sum of $45,000.00 is sufficient to satisfy your client's claim. This offer shall remain open for a period of 14 days.
>
> In accordance with the Rules, we require written acknowledgement of service from you of this offer of compromise."
>
> "We refer to your letter dated the 21st December, 1987 and advise that we have been instructed that our client is not prepared to accept the offer contained in that letter."

His Honour was generally of the view that Section 34(5A) referred to guidelines rather than any kind of strict formula as to the contents of an Offer of Compromise. He believed an Offer of Compromise could be made in accordance with Order 26 even though not all of the provisions of Order 26 readily applied. His Honour did consider that if the sub-section is to apply, there must be an Offer of Compromise in accordance with the Rules. In particular, the offer had to be in writing and it had to contain a statement that it was served in accordance with the rules. His Honour concluded that the letter in question did not contain the statement that it was served in accordance with Order 26 and therefore could not be properly described as being an Offer of Compromise made in accordance with the Rules within the strict meaning of Section 34(5A).

Despite the foregoing, His Honour did not believe that the offer was accordingly wholly ineffective. His Honour referred to the decision of *Cutts*—v—*Head* (1984) 1 Ch. 290 and the general policy considerations