> " . . . it enables the parties and the disinterested observer to know that the opinion of the referee is not arbitrary, or influenced by improper considerations but is the result of a process of logic and the application of a considered mind to factual circumstances."

The position of the referee in the decision making process in the Court proceedings was explained as follows:—

> " . . the referee makes no decision: he expresses an opinion to the Court. But if it appears to the Court that the parties have had a fair opportunity to place their evidence and arguments before the referee, and if his opinion discloses the application of reason to the material before him, even if the Court may have been disposed to come to a contrary conclusion, there will be a disposition in the Court to adopt and rely upon the report. In this manner, the referee is, although himself not making any decision, potentially caught up in the decision making processes of the Court. It follows that he must observe concepts of natural justice in preparing his opinion".

His Honour did not adopt the referee's report since in his view the reasons given by the referee were not sufficient. Further, the referee had answered questions put to him in opposite or consistent ways.

The referee had referred to a witness by a Christian name. His Honour regarded this as "both unwise and improper".

The costs of the reference were ordered to be costs in the cause but the plaintiffs were ordered to pay the defendants' costs.

The defendants were not willing for the matter to be referred back to the referee and requested His Honour to give judgment on the basis of the evidence before the referee. His Honour was not prepared to do this since there were contested questions of fact and of expert opinion which he could not really resolve without the assistance of cross-examination and submissions. He listed the matter for hearing before him a few days later.

Leave to Appeal—Principles to be Applied

Leighton Contractors Pty Ltd v. Kilpatrick Green Pty Ltd

SUPREME COURT OF VICTORIA

Unreported,
Southwell J.
11 April, 1990

The Victorian Supreme Court has again considered the question of the principles to be applied in determining whether or not leave to appeal from an arbitrator's award should be given pursuant to section 38 of the *Commercial Arbitration Act* 1984.

BACKGROUND

Leighton Contractors Pty Ltd ("the contractor") and Kilpatrick Green Pty Ltd ("the sub-contractor") entered into an agreement in the form of the MBW-1 standard form contract. The agreement related to electrical works to be carried out at the Melbourne University Graduate School of Management. Also forming part of the agreement was a letter of intent.

In the arbitration it was alleged, by the sub-contractor, that the progress of the works had been delayed by the contractor and accordingly the sub-contractor was entitled to damages. The arbitrator awarded damages in favour of the sub-contractor. In addition, the arbitrator, in an interim award, indicated that he would allow further moneys to the sub-contractor on the basis of the principle in *Hungerfords v. Walker* 84 A.L.R. 119. The application of this principle would have resulted in the sub-contractor being awarded interest at the relevant bank overdraft rates on a compound basis for the period of time that the moneys due to the sub-contractor had not been paid.

It was the contractor's argument that the entitlement of the sub-contractor to damages was subject to a ceiling referred to in the letter of intent. The arbitrator held that the sealing applied to clause 10.11 of the contract document, which provided for the reimbursement of loss and expense to the sub-contractor where there had been delays arising by reason other than a breach by the contractor, but did not apply to the sub-contractor's entitlement to damages under clause 10.08, where there were delays caused by the contractor.

The contractor also submitted that the letter of intent should have been rectified by the arbitrator. The letter of intent referred to a daily ceiling on prolongation costs. It was submitted that the reference to a daily ceiling was an error and the ceiling was intended to be a weekly ceiling. The arbitrator declined to rectify the document.

EXERCISE OF DISCRETION

It was submitted, on behalf of the contractor that the guidelines laid down in *Pioneer Shipping Ltd v. B T P Tioxide Ltd* ("the Nema") 1982 A.C. 724 should not be applied as the application of the guidelines would result in a restriction on the court's discretion under section 38. The decision of the Full Court of the New South Wales Supreme Court in *Qantas Airways Ltd v. Joseland and Anor* (1986) 6 N.S.W. L.R. 327 was relied upon in support of this submission. The decision in *Irvine v. Carbines* (1981) V.R. 861, which was a decision of the Full Court of the Victorian Supreme Court, was also relied upon to support the proposition that where guidelines for the exercise of a discretion are not contained in the relevant act of Parliament then rules should not be laid down by the courts governing the exercise of the discretion.

His Honour noted that the Victorian Supreme Court had, on five separate occasions, upheld the applicability of the Nema guidelines. This

had been done by Crockett J. in *Karenlee Nominees Pty Ltd v. Robert Salzer Constructions Pty Ltd* (1988) V.R. 614, Nathan J. in *Zafir v. Papaefstathiou* (unreported 30 October 1986) and *Muirfield Properties Pty Ltd v. Eric Kolle & Associates Pty Ltd* (unreported 7 November 1986), O'Bryan J. in *Costain Australia Ltd v. F W Nielsen Pty Ltd* (unreported 21 May 1987), Marks J. in *Hooker Constructions Pty Ltd v. Giab Nominees Pty Ltd* (unreported 2 November 1988) and *Shinewell v. R Vandervilk & Associates Pty Ltd* (unreported 17 November 1980) and by Tadgell J. in *Keys Trading International Pty Ltd v. Soundview Shipping Ltd and Ors* (unreported 8 March 1989).

However, His Honour also noted that Crockett J. in *Karenlee's case* had suggested that the Nema guidelines could be departed from when it was demonstrated that the case was not fit for their application. Vincent J., in *Thompson v. Community Park Developments Pty Ltd* (unreported 4 March 1987) had expressed doubts about the applicability of the guidelines.

His Honour considered it desirable that there be consistency between the Australian States on this question. Desirability for consistency in similar matters of national relevance, such as the interpretation of Commonwealth Legislation, had been upheld in *R v. Parsons* (1983) 2 V.R. 499.

The possibility that the observations of the Full Court in *Irvine's case*, which did not support the imposition of guidelines on the exercise of a discretion, or the decision in *Parson's case*, which supported consistency between the States on matters of national interest, were not cited to Crockett J. in *Karenlee's* case was acknowledged. However His Honour did not consider that the decision in *Karenlee's case* would necessarily have been any different had these cases been cited.

Having regard to the approach to date of the Victorian Court His Honour considered it desirable he follow the decision in *Karenlee's case*. Accordingly His Honour applied the Nema guidelines. However, having regard to the different views expressed by the Full Court of the New South Wales Supreme Court and the observations of the Victorian Full Court in *Irvine's case* and *Parson's case*, His Honour considered it appropriate that the question of the applicability of the Nema guidelines be considered by the Full Court. His Honour, for reasons discussed later in this note, refused the application for leave to appeal, based upon the application of the Nema guidelines, but granted the contractor leave, pursuant to section 38(6) of the Act, to appeal to the Full Court against his decision.

RECTIFICATION

In relation to the contractor's submissions that the arbitrator had made an error in not rectifying the contract document His Honour concluded that whether he was to apply the Nema guidelines, or whether he was

to exercise his discretion independent of those guidelines, leave to appeal on that point would not be granted. His Honour came to this decision on the basis of the submissions made to the arbitrator and the evidence put before the arbitrator.

His Honour did not express a view on the question of whether the ceiling on the prolongation costs applied to damages awarded under clause 10.08.

HUNGERFORDS CASE

His Honour then considered the question of the applicability of *Hungerford's case*. *Hungerford's case* came before the High Court on appeal from the Full Court of the South Australian Supreme Court. One of the arguments put before the court in that case was that section 30C of the Supreme Court Act 1935 (South Australia) provided a code dealing with the question of interest and accordingly there was no entitlement to interest other than pursuant to the terms of that section. The High Court rejected this argument.

It was submitted to His Honour, by the contractor, that section 31(2) of the Supreme Court Act 1981 (Victoria) was materially different from the South Australian provision and had the effect of establishing a code regarding interest. Accordingly, it was submitted, *Hungerford's case* did not have any application in Victoria. The difference between the two sections which was relied upon was the existence of paragraphs (d) and (e) in the South Australian Act and the absence of those paragraphs in the Victorian Act. The important paragraph for the purposes of the argument was paragraph (e). That paragraph provides as follows:

> "This section does not—
> (e) limit the operation of any other enactment or rule of law providing for the award of interest."

His Honour was of the view that, applying the Nema principle to the arbitrator's decision on the Hungerford's issue, leave to appeal from the arbitrator's decision should not be given. However His Honour went on to say that if he was to be guided by observations of the New South Wales court in the *Qantas case* then he would be disposed to grant leave to appeal on this issue. If the appeal against His Honour's decision proceeds then the question of the continuing applicability of the Nema guidelines in Victoria will be the subject of a decision of the Full Court and the question of the applicability of the principles set out in *Hungerford's case* in Victoria may be the subject of a decision of the Supreme Court.