CASE NOTES

ARBITRATOR – LIABILITY FOR COSTS; IMMUNITY OF ARBITRATOR

Supreme Court of Victoria
Nathan J, 19 October 1994

Lindsay Sinclair & Lindsay Sinclair Pty Ltd vs
Colin & Rosalee Bayly & James Earle

FACTS:
Building dispute arbitrated under the terms of the Commercial Arbitration Act 1984. Arbitrator's award set aside owing to the arbitrator's admission of and reliance upon material not properly before him and without notice to the parties. Parties unable to agree to costs. Summons issued pursuant to the rules of the Supreme Court 0.9.06B(ii) directing arbitrator to show cause why he should not be joined as a party.

ISSUES:
The specific issue considered was whether the arbitrator should be joined as a party to the action and be liable for costs.

A more general question raised was the immunity of an arbitrator from liability arising out of his performance in the capacity of arbitrator.

HELD:
Justice Nathan concluded that the arbitrator in this case was immune from liability. He thus made no order for costs with the result that all parties carried their own costs.

Two possible sources of immunity were identified:-

1. An express statutory provision in Section 51 of Commercial Arbitration Act 1984. This section provides that an arbitrator is not liable for negligence but will be liable for fraud in respect of anything done or omitted to be done in the capacity of arbitrator.
   Failure to follow the correct procedure was held to be negligent within the meaning of the section thereby granting immunity to the arbitrator. However Justice Nathan concluded 'the judgment as to what is negligent must necessarily be evaluative and depend upon the given circumstances'.
   In circumstances where non-negligent conduct of an arbitrator leads to an award being set aside the arbitrator may be personally liable for costs. The limited nature of the immunity under Section 51 was illustrated by comparison with the absolute immunity granted under Section 27 A(1) Supreme Court Act 1986.

2. *The common law*
Stannard -vs- Sperway Constructions Pty Ltd (1990) VR 673 was cited as authority for the proposition that an arbitrator joined as a party could be liable to a costs order.

The following public policy reasons for denying immunity to an arbitrator were identified.

- Such immunity would be exceptional in law.
- Parties help select the referee or arbitrator and hence the position is distinguishable from a judicial one.
- The ordinary rule in our society is that a person wronged should have legal redress.
- Arbitrators have a financial and vested interest in conducting cases and as such should not be immune.
- By upholding the liability of arbitrators redress is forwarded to the parties before them. It ensures a proper system of lost distribution
- If immunity is to be granted it should be done in express terms.

However immunity ought to be granted on the basis that arbitrators just as much as Judges are required to be independent and removed from risk that disaffected parties will challenge unnecessarily their awards.

This immunity is not absolute however. If a referee does not act in good faith or acts fraudulently the common law will not immunize him from personal liability.

CASES CONSIDERED:
Stannard -vs- Sperway Constructions Pty Ltd (1990) VR 673
Najjar -vs- Haines (1991)'25 NSW LR 224.

3. **Statutes considered**
Commercial Arbitration Act 1984 Section 51, Supreme Court Act 1986 Section 27 A (1).

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REPORTING CASES

From time to time a matter in which an arbitrator has been involved may be subject to an action in the Courts.

Should such a member be so involved or become aware of such cases it would be appreciated if a copy of the judgement could be obtained and forwarded to the Institute's CAO.

Arrangements will then be made for a case note to be prepared and published in "The Arbitrator".

The co-operation of members in this matter would be very much appreciated.