CASE NOTES

APPLICATION TO COURT UNDER SEC. 38 FOR LEAVE TO APPEAL AN ARBITRATOR'S DECISION AND FOR ORDERS SETTING ASIDE AN AWARD AND REMOVING AN ARBITRATOR

Supreme Court of New South Wales, Unreported
Rolfe J – 4 July, 1994

State of New South Wales v Coya (Constructions) Pty Limited
The Minister of Public Works for the State of New South Wales (as principal) and Coya (Constructions) Pty Limited (as Contractor) entered a contract for the construction of a tunnel to convey water from one creek to another and for associated works to supply the Gosford-Wyong water system. At the same time as these works the contractor was carrying on similar work for the principal at Norah Head. Disputes arose either out of or in connection with the contract and its performance and these were referred to arbitration. In his award the arbitrator made various findings in relation to the terms of the contract which, he found, included oral terms. The arbitrator was faced with serious issues of credibility in an arbitration which included allegations which were made by the principal that the contractor was making claims which were deliberately inflated and spurious.

The arbitrator found for the contractor and ordered the principal to pay $17,228,141 damages. The principal sought leave to appeal the arbitrator's award on the basis that it contained several manifest errors of law on its face, and alleging that the arbitrator was guilty of actual or apprehended bias leading to a grossly excessive award. The allegations of bias ranged over a lack of procedural fairness, communications with the solicitors for the Contractor, selective consideration of evidence, and decisions favourable to the Contractor on numerous matters of fact and law allegedly showing that the Arbitrator was unable to approach the matter in an unbiased manner.

After reviewing the cases on leave to appeal his Honour said there were two matters that have to be decided. First, whether in the exercise of discretion one should grant leave to appeal, even assuming the requirements of s.38(5) are satisfied (See *Promenade Investments Pty Limited v State of New South Wales* (1992) 26 NSWLR 203 and *Natoli v Walker* (26 May, 1994, Unreported) (*See The Arbitrator* Vol. 13 No. 3 at page 163) and secondly whether the requirements of s.38(5) are satisfied.

The principal was largely unsuccessful, the Court finding that nothing the arbitrator did showed bias or indicated a reasonable apprehension of

bias. Many of the matters alleged to constitute manifest errors on the face of the award would have required the Court to evaluate questions of fact and seek to determine whether the Arbitrator was justified in finding, from those facts, the oral terms he did. His Honour said that:

> "this exercise is contrary to the established basis upon which I can determine whether there is a manifest error of law on the face of the Award, and, in any event, does not yield a manifest error on the face of the award."

Other questions involved matters of construction of the pleadings and contractual terms. On one construction of the pleadings certain matters upon which the arbitrator made findings were not raised. The Court believed that the construction of the pleadings which the arbitrator had taken [in which the matters were raised in the pleadings] was open to him and that, in any event the parties had fought the case on those issues in the arbitration. Both parties had been given an opportunity to lead evidence and make submissions on the matters in question.

There were however two manifest errors on the face on the award. The arbitrator had awarded both damages for consequential loss and an amount for compound interest based upon the principles in Hungerfords v Walker (1990) 171 CLR 125. There was no explanation for this which would appear on the face of the award to be double compensation. The Court remitted the matter back to the arbitrator for his further consideration rather than granting leave to appeal on this question, because His Honour believed there may have been factual matters which the Arbitrator had considered which explained his award, but which had not been stated in the award. See *Sabemo Pty Limited v Malaysia Hotel (Australia) Pty Limited* (Giles J- 4 June, 1992unreported)

A further manifest error on the face of the award existed in relation to the arbitrators construction of various clauses of the contract. In considering his discretion whether to grant leave to appeal his honour had regard to the fact that all that had to be said about the matter had been said and that there would be hardly any additional cost associated with granting leave to appeal. He indicated subject to further submissions as to the amount involved and any other matter relevant to the exercise of discretion, that leave to appeal should be granted.

The arbitrator awarded damages for the cost of two additional men employed during a period which was outside the claim as particularised in the points of claim. This was a manifest error on the face of the award. The Court granted leave to appeal being satisfied that the costs associated with doing so would be insignificant.

Misconduct was alleged on two main grounds. Firstly, it was said that the various unilateral communications between the arbitrator and the solicitors for the claimant which included a request by the arbitrator for a further submission from the claimant showed actual bias or gave rise to a reasonable apprehension of bias.

Secondly it was said that the number of manifest errors on the face of

the award when looked at together indicated bias.

His Honour looked at the matter against the background of all relevant factual considerations and said

> "that the parties were content for conversations on non controversial matters to take place with the Arbitrator provided they were furnished with any communications forwarded to the arbitrator, and secondly, if this not be so, that the principal, by its conduct, elected to waive any right to complain about what had transpired."

His honour applied the case of *Vakauta v Kelly* (1989) 167 CLR 568. Once a party becomes aware of matters which would give rise to an impression of bias he is not entitled to stand by until the contents of the final judgment are know, and then, if those contents prove unpalatable, attack the judgment on the grounds of bias.

The conduct of the arbitrator in seeking further submissions from the claimant to provide him with a 'map' linking their submissions on quantum to the parts of the evidence which had already been given did not constitute misconduct. His Honour said that an arbitrator who has control over the procedures to be adopted could seek further submissions from a party, subject to the other party being made aware of them, as to where, in the evidence before him, certain matter appears. The principal was given every right to reply to any additional submissions made by the claimant.

On the second ground of bias, namely that the errors in the award were such as to give rise to an apprehension of bias, his honour, after reviewing the relevant authorities said:

> "As has been made clear by the Act, and Promenade and Natoli there is no appeal on a question of fact, and Promenade and Natoli have emphasised that in reviewing an Arbitrator's decision the Court must not, even if it perceives errors of fact, seek to correct them save in quite exceptional circumstances such, perhaps, as an absence of evidence. In the result manifest errors of fact, unless they can be ascribed to bias which, in turn, must flow from something other than the making of a manifest error or manifest errors of fact, cannot amount to misconduct. Errors of law, so it seems to me, fall within the same position. Manifest errors of law on the face of the Award are accommodated, subject to the discretionary considerations, by the ability of the Court to correct them."

G. HOLLEY